

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 615.

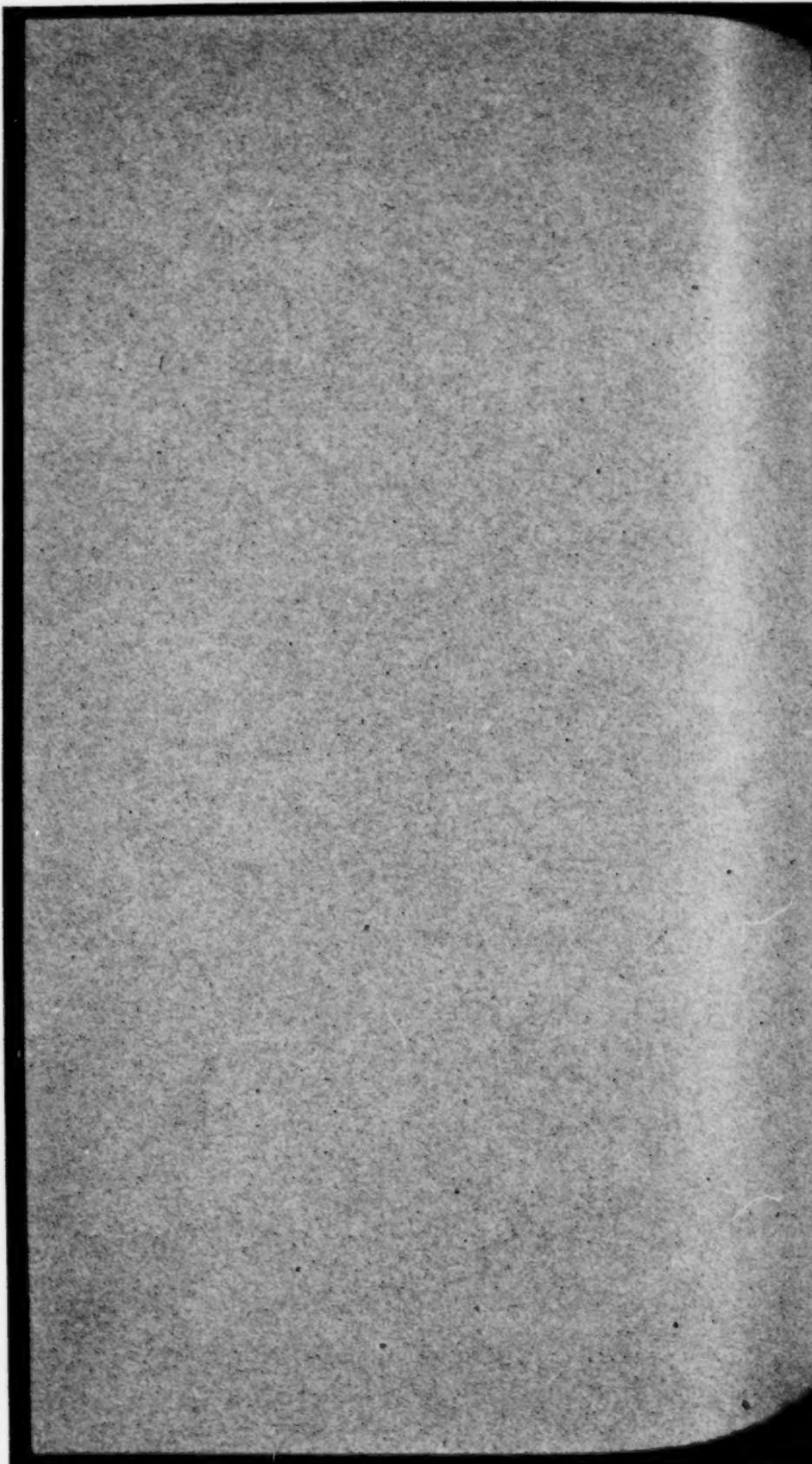
**JOHN A. GROGAN, COLLECTOR OF INTERNAL REVENUE
FOR THE FIRST DISTRICT OF MICHIGAN, ET AL,
APPLICANTS,**

vs.

HIRAM WALKER & SONS, LTD.

**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE EASTERN DISTRICT OF MICHIGAN.**

FILED NOVEMBER 8, 1921.



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Bill of complaint.

United States of America, in the District Court of the United States
for the Eastern District of Michigan, Southern Division,
In Equity.

HIRAM WALKER & SONS, LTD., PLAINTIFF,
vs.
RICHARD I. LAWSON AND JOHN A. GROGAN, defendants, } No. 411.

*To the District Court of the United States in and for the Eastern
District of Michigan, Southern Division, in Equity:*

Hiram Walker & Sons, Ltd., a corporation organized and existing under and by virtue of the laws of the Province of Ontario, Dominion of Canada, plaintiff herein, brings this bill of complaint against Richard I. Lawson and John A. Grogan, defendants herein, and complains and says:

I.

That plaintiff is a corporation organized and doing business under and by virtue of the laws of the Province of Ontario, Dominion of Canada, is a resident of the town of Walkerville, Province of Ontario, Dominion of Canada, and is a subject of the King of Great Britain and Ireland.

II.

That the defendant herein, Richard I. Lawson, is the United States collector of customs for the Eastern District of Michigan, whose office is located in the city of Detroit, and State of Michigan; that said defendant, Richard I. Lawson, is subject to and performs the orders and directions of the Secretary of the Treasury for the United States, in connection with the seizure of whiskey or intoxicating liquors offered for transshipment in bond as hereinafter more fully set forth; that the defendant, John A. Grogan, is the collector of United States internal revenue for the Eastern District of Michigan, with his office located in the city of Detroit, in the State of Michigan, and is an agent of the United States Internal Revenue Department, for the Eastern District of Michigan, charged with the duty of enforcing the provisions of the so-called "National prohibition act" sometimes hereinafter called the Volstead Act, being an act passed by the Congress of the United States on October 28, 1919, and known in said act as the "National prohibition act"; that said defendants are citizens and residents of the said State and Eastern District of Michigan.

III.

That plaintiff is, and for to wit, thirty years last past and upwards, has been, at Walkerville, Ontario, a manufacturer and distiller of whiskey, and plaintiff has during all of said time and prior thereto lawfully offered for sale and sold said whiskey in nearly all parts of the world (including the United States up until the time that importation of whiskey into the United States was forbidden by law); that during all of said time and up until the time of the grievances hereinafter complained of, plaintiff has caused said whiskey to be conveyed from Walkerville, Ontario, to a port of the United States and in transit therefrom through the United States to various foreign countries pursuant to the provisions of section 3005 of the Revised Statutes of the United States and the amendments thereto (being section 5690 of the United States Compiled Statutes for the year 1916), and the regulations issued and in force thereunder, and pursuant also to the provisions of Article XXIX of the treaty between the United States and Great Britain, dated May 8, 1871, ratified June 17, 1871, and proclaimed July 4, 1871.

IV.

That said section 3005 of the Revised Statutes of the United States, as amended (being section 5690 of the United States Compiled Statutes for the year 1916) is as follows:

"All merchandise arriving at any port of the United States destined for any foreign country may be entered at the customhouse and conveyed in transit through the territory of the United States without the payment of duties under such regulations as to examination and transportation as the Secretary of the Treasury may prescribe."

V.

That the material provisions of said Article XXIX of the treaty hereinbefore mentioned are as follows:

"It is agreed that for the term of years mentioned in Article XXXIII of this treaty, goods, wares, or merchandise arriving at the ports of New York, Boston, and Portland, and any other ports in the United States which have been or may from time to time be specifically designated by the President of the United States and destined for her Britannic Majesty's possessions in North America may be entered at the proper customhouse and conveyed in transit without the payment of duties through the Territories of the United States, under such rules, regulations, and conditions for the protection of the revenue as the Government of the United States may from time to time prescribe; and under like rules, regulations, and conditions, goods, wares, or merchandise may be conveyed in transit without the payment of duties from such possessions through the

territory of the United States for export from the said ports of the United States."

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VI.

That during the year 1919 the Congress of the United States passed the act hereinbefore mentioned, known as the "national prohibition act," in order to put into effect the provisions of the eighteenth amendment of the Constitution of the United States, section one of which constitutional amendment is as follows:

"After one year from the ratification of this article, the manufacture, sale or transportation of intoxicating liquors within, the importation thereof into or the exportation thereof from the United States and all Territories subject to the jurisdiction thereof for beverage purposes is hereby prohibited."

VII.

That title 2, section 3, of said national prohibition act, sometimes called the Volstead Act, reads as follows:

"No person shall on or after the date when the eighteenth amendment to the Constitution of the United States goes into effect manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor except as authorized in this act, and all the provisions of this act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented."

VIII.

That since said constitutional amendment and said Volstead Act became in force, plaintiff has ceased importing said whiskey into the United States, but has continued under the regulations of the Secretary of the Treasury to convey said whiskey in transit, in bond, through the United States pursuant to the statutes and the treaty hereinbefore mentioned, said whiskey in all of such cases entering the United States from Canada and destined for foreign countries, and plaintiff has in fact shipped most of its goods, destined for foreign countries, through ports of the United States such as New

5 York, New Orleans, and other ports, said goods usually entering the United States either at the port of Detroit or the port of Buffalo, and being sent to New York or some other port for the foreign shipment. That if plaintiff were compelled to convey its whiskey to Mexico, Central America, and South America otherwise than in transit, in bond, through the United States, the increase in freight and transportation charges, cost of handling, and delay caused in making deliveries would be so great as to greatly impair if not entirely destroy the business of this plaintiff in said foreign countries. That plaintiff now has bona fide orders for sale and delivery of more than 40,000 cases of its whiskey,

aggregating upwards of \$300,000 in value, entered on its books, from residents and dealers in many or all of the countries of South America, Central America, Europe, Asia, and Africa, and it has been and still is its intention to continue (if permitted so to do) its practice of conveying said whiskey in transit, in bond, from time to time, through the United States to such foreign countries in fulfilment of such orders. Plaintiff says in this connection that the loss in whiskey in previous years during transshipment in bond through the United States has been negligible and, according to plaintiff's information, no greater in proportion than the loss occurring in similar transshipments of other merchandise. That in 1920 plaintiff conveyed from Canada in transit, in bond, through the United States, to foreign countries, in the manner aforesaid 86,815 cases of whiskey, aggregating \$700,982.00 in value; that of said amount 286 6-12 cases were lost of a total value of \$2,330.80.

IX.

That pursuant to the practice and custom of plaintiff as hereinbefore set forth, plaintiff did, on the 14th day of February, 1921, present a shipment of its whiskey, belonging to the plaintiff, and consisting of 25 cases, to the agents of the said United States collector of customs at the port of Detroit, State of Michigan, 6 to be conveyed in transit, in bond, through the United States to the country of Mexico, to be there delivered to plaintiff's customers, residing in said country of Mexico. That plaintiff herein duly complied with all the laws and regulations applicable to the conveyance of said shipments in transit, in bond, through the United States, but without complying or attempting to comply with any of the provisions of the so-called Volstead Act, for the reason that plaintiff claims and has always claimed that none of the provisions of said Volstead Act are applicable to such conveyances in transit, in bond, through the United States, and up until the time of the seizure hereinafter mentioned, neither the said Commissioner of Internal Revenue, his assistants, agents or inspectors nor the said collector of customs, his assistants, or agents had ever interfered with such conveyance, in transit, in bond, through the United States, by plaintiff herein. That plaintiff executed its bond in due form therefor and said shipment was ready in all respects for delivery to and was delivered to a common carrier in said city of Detroit, for conveyance in transit, in bond, through the United States to Mexico.

That said shipment, belonging to plaintiff, was destined for Mexico City, Mexico, and each and every one of the twenty-five cases in said shipment was plainly marked as follows:

"A. T. M. Port of Detroit.
Mexico. In bond for
Vera Cruz. New Orleans."

and said cases were numbered from 1 to 25, respectively.

X.

That shortly thereafter the said defendant, Richard I. Lawson, claiming that he was authorized to and purporting to act in pursuance of the provisions of the said Volstead Act, formally seized said shipment while the cases thereof were still in the possession
7 of said common carrier for conveyance in transit, in bond,

through the United States to the said country of Mexico, and refused to allow said shipment to proceed to its destination, and claimed the right so to do, on the ground that said shipment was being transported illegally in the United States, contrary to the provisions of the said 18th amendment of the Constitution of the United States and contrary also to the provisions of said Volstead Act. That as complainant is informed and believes, the said defendant, Richard I. Lawson, was soon thereafter informed of a rehearing before the Attorney General of the United States, of the legal questions involved in such seizure and similar seizures and of a reconsideration of its interpretation by said department of the said 18th amendment and of the provisions of the Volstead Act, then claimed by the Treasury Department of the United States to be applicable to such and to forbid such transshipment and similar transshipments; that a rehearing was had and during the course of such rehearing the said shipment in question was retained by said defendant, Richard I. Lawson, in his custody; that said rehearing was finally terminated and the right of the Government to seize in transit shipments of whiskey in bond, as aforesaid, was reaffirmed, by the Treasury Department of the United States, and on, to wit, July 15, 1921, the said Richard I. Lawson again formally seized the said shipment in question, purporting to act in pursuance of the authority granted by the provisions of the Volstead Act and previously recited above in this paragraph.

XI.

That plaintiff has been furnished by assistants of the defendant, Richard I. Lawson, collector of customs, with a copy of a telegram recently sent said defendant from Washington, by Treasury Department of the United States, reading as follows:

8 "Pursuant Attorney General's opinion June thirtieth affirming previous opinion February 4th, you are directed to refuse transportation and exportation entries for all intoxicating liquors, your district not covered by prohibition permit. This order is to be effective on all such liquors shipped from foreign countries on and after July 15th, 1921, such liquors shipped on or after that date should be seized and forfeited in usual manner under customs regulations.

That the permit referred to is that issuable by the Federal prohibition director for the State of Michigan, acting under the national prohibition act, and regulations of the United States Treasury Department thereunder.

XII.

The plaintiff has been informed by the assistants of said defendant, Richard I. Lawson, that the directions of said telegram will be obeyed fully and strictly obeyed, and said assistants have threatened and stated that all whiskey offered by plaintiff for shipment in transit in bond in accordance with the previous practice will be seized by said defendant, notwithstanding that such shipment originates in a foreign country (i. e., Canada) for delivery in another foreign country (i. e., Mexico or any country in Central or South America), and plaintiff believes that said defendant and his assistants will carry out his threats and statements.

XIII.

That the Federal prohibition director for the State of Michigan has stated to the representatives of this plaintiff that in no event would he grant a permit for any transshipment of intoxicating liquors, in bond, despite the fact that such shipments originate in a foreign country and are intended for delivery in another foreign country; that plaintiff believes such statements of said Federal prohibition director.

XIV.

That on, to wit, the 19th day of July, 1921, this plaintiff
9 notified the so-called bond clerk and assistant of said Richard

I. Lawson, collector of customs, defendant herein, that this plaintiff desired to tranship in bond from Walkerville, Ontario, in the Dominion of Canada, through the port of Detroit, and overland through the United States to the port of New Orleans, in the United States of America, and from New Orleans by water to Puerta (i. e., port) Barrios, in the country of Guatemala, Central America, 600 cases of whiskey belonging to plaintiff, of a value of upwards of \$4,500.00, exclusive of any interest, taxes, and transportation charges, for delivery in the last-named place in Guatemala to Dalgleisch Hermanos, a bona fide and regular agent of this plaintiff. That the said shipment was prepared and ready for transportation in the city of Walkerville, Ontario, and this plaintiff was about to bring over the said 600 cases when this plaintiff was informed by the assistant of said Richard I. Lawson, defendant herein, that the said merchandise would be seized and forfeited by the assistant of said Richard I. Lawson, collector of customs, under the orders of the U. S. Treasury Department, and said defendant as soon as the said whiskey reached the city of Detroit, unless the said plaintiff would obtain a permit from the Federal prohibition director of the State of Michigan, acting under the aforesaid Volstead Act, permitting the aforesaid transshipment. That this plaintiff, on said day last mentioned, interviewed the said Federal prohibition director for the

State of Michigan, and the latter stated that, acting under the directions of the Treasury Department of the United States, he would decline to give a permit for said transshipment. That this petitioned believed the statements made by the assistant of the said defendant, Richard I. Lawson, collector of customs, and believes that the aforesaid merchandise would be seized if brought into Detroit.

XV.

That plaintiff has been informed and is apprehensive that the defendant, John A. Grogan, acting as an agent of the 10 Commissioner of Internal Revenue, under the interpretation made by the United States Secretary of the Treasury of section 2 and other sections of the said prohibition act, will institute criminal proceedings against this plaintiff and against its property offered for transshipment in bond, from Canada to Mexico, or Central or South America, through portions of the United States and against employees and agents of this plaintiff; engaged in transshipment of whiskey in bond shipped from Canada and transshipped from the port of Detroit to other points in the United States, for transshipment there and for ultimate delivery in foreign countries, and that the said defendant will thereby subject this plaintiff, its agents and employees, and property to various fines, penalties, and forfeitures, set forth in the national prohibition act. Plaintiff under advice of counsel avers that said 18th amendment and Volstead Act, legally and correctly construed, does not hinder, forbid, or prevent transshipment of whiskey in bond through the United States from and to a foreign country.

XVI.

Plaintiff further shows that said eighteenth amendment relates only to intoxicating liquors "for beverage purposes" as therein set forth; that there is no provision either in said eighteenth amendment to the United States Constitution or in said Volstead Act declaring or making conveyance of whiskey in transit, in bond, as aforesaid, through the United States, entering from and destined to foreign countries illegal, and such conveyance is not forbidden either by the said eighteenth amendment or said Volstead Act, but is expressly authorized by said section 5690 of the United States Compiled Statutes of 1916 and the treaty of May 8, 1871, between the United States and Great Britain hereinbefore mentioned, that if the said Voistead Act be construed so as to forbid or prevent such conveyance in transit in bond as aforesaid, then such construction would make said act unconstitutional.

XVII.

Plaintiff further shows that the practice of transit in bond of liquors has been exercised for a great many years past. That

although the constitutional amendment and the Volstead Act went into effect on or about the month of January, 1920, the same practice continued without intermission or interference until the seizures hereinbefore complained of; and that this privilege has never been abused or used as a cover for smuggling liquor into the United States, but on the contrary, Mr. Geo. W. Ashworth, the Chief of the Customs Division of the Treasury Department, having charge of these matters for the Treasury for years past, expressly stated on the said rehearing before the Attorney General that there had never been any complaint of any such violations and none such had occurred so far as known. Plaintiff further says on information and belief that no claim has ever been made by the prohibition enforcement officers of the Government that there have been any such violations or that the further exercise of the privilege will result in introducing liquors into the United States in violation of the eighteenth amendment or for beverage purposes. It further shows that said practice of shipping in bond was continued under the constitutional amendment and the Volstead Act for nearly a year and a half and down to the present time, only after the matter was given due consideration by the legal departments of the four different branches of the Government, namely, the attorneys for prohibition unit of the Internal Revenue Department of the Treasury; the attorneys for Customs Division of the Treasury; the counsel for the United States Railroad Administration; and finally the General Solicitor for the Treasury Department, Judge Becker, all of whom rendered their opinions that the practice was not in violation
12 of either the eighteenth amendment or the Volstead Act.

XVIII.

Plaintiff further shows that unless Richard I. Lawson, defendant herein, is restrained he will dispose of the contents of said shipment hereinbefore mentioned, ostensibly in accordance with the provisions of said Volstead Act, and plaintiff will be thereby deprived of its property without due process of law, and will be greatly damaged and irreparably injured. That the actions and doings of said defendants committed, threatened, and apprehended as hereinbefore set forth as contrary to and in violation of the Constitution and statutes of the United States hereinbefore mentioned, and are also contrary to and in violation of the provisions of the treaty of May 8, 1871, between the United States and Great Britain, hereinbefore mentioned, and plaintiff has no adequate remedy at law in the premises.

XIX.

Plaintiff alleges that if it should be deprived of the right to tranship liquor through the ports of the United States, pursuant to the terms of section 3005 of the Revised Statutes of the United States,

as amended (being section 5690 of the United States Compiled Statutes of 1910), or if the terms and provisions of the so-called national prohibition act, as construed by the Secretary of the Treasury, should be held to repeal section 3005 of the Revised Statutes of the United States, as amended, a large part of the valuable business of the plaintiff will be destroyed and future profits therefrom greatly diminished, if not made impossible. That the injury and damage to the said plaintiff resulting from said action would be incapable of measuring and adjudication in an action at law and such seizures would compel the plaintiff to cease the transaction of business with Mexico and many parts of Central and South America to its irreparable injury.

13

XX.

This is a suit of civil nature, arising under the Constitution, laws, and treaties of the United States. The matter in controversy exceeds the sum of three thousand dollars in full, exclusive of interest and costs.

XXI.

Plaintiff shows that irreparable damage will be done it unless a temporary restraining order shall be granted forthwith, without notice to the defendants. That at the present time plaintiff has bona fide orders for shipment of more than thirty thousand cases of its whiskey, aggregating upwards of \$250,000.00 in value, for immediate delivery to customers in the following places and countries, viz:

Dutch West Indies, Dutch Guinea, Haiti, Cuba (Santiago and Guantanamo), Mexico, Guatemala, Spanish Honduras, Salvador, Nicaragua, Costa Rica, Republic Panama, Colombia, Venezuela, Ecuador, Peru.

That if plaintiff be barred and prevented from filling the aforesaid orders to its customers, in the foregoing countries, by conveyance in transit in bond through the United States in the manner hereinbefore practised by plaintiff, and as above set forth, it will be necessary for plaintiff to fill said orders by shipping its merchandise from Walkerville, Ontario, to Montreal, Canada, by railroad, and to tranship the same at Montreal for conveyance by steamer to England, and again to tranship the said merchandise in England for conveyance by steamer from England to the respective customers in the above-named countries; that even if plaintiff be successful in securing promptly space on ships in England for transportation of said merchandise from England to the countries aforesaid, the expenses of

14 railroad transportation from Walkerville to Montreal, boat transportation thence to England, and boat transportation

from England to the aforesaid countries, will be so great as to destroy the business of plaintiff in said countries, in competition with distillers already located in Scotland and England; and selling their

own whiskey in the aforesaid countries: that said English and Scotch distillers would have the advantage of a freight rate cheaper than the freight rate afforded this plaintiff, because of the expense to plaintiff of transportation from Walkerville, Ontario, to England, and the expense of transportation to Montreal and in England. Plaintiff says further that the delay in delivery by shipment through the route last mentioned would be so great that months would elapse before the merchandise reached plaintiff's customers in the respective countries mentioned above, and that as a result thereof the aforesaid customers would refuse to await the delivery of merchandise from plaintiff and would cancel their orders for plaintiff's products and would buy the whiskey of the English and Scotch distillers, who compete with plaintiff in the aforesaid countries. Plaintiff says further that there is also considerable doubt as to the ability of plaintiff's representatives in England to secure cargo space for reasonably prompt shipments of its merchandise from England to the countries aforesaid, and that unless cargo space were obtained readily, plaintiff would also have to bear the burden of heavy storage charges and handling charges while its merchandise was obliged to remain in England awaiting cargo space. Plaintiff says that if it should once lose its business in the countries aforesaid, it will be very expensive and difficult if not impossible to recover the same. Plaintiff says that in view of its peculiar situation as above outlined, irreparable damage will be done plaintiff if plaintiff be required to serve notice to the defendants and await a hearing hereon before plaintiff can secure relief.

15 Plaintiff therefore prays:

(a) That the said defendants may true answer make but not under oath (answer under oath being hereby expressly waived) to the foregoing bill of complaint and to each and every paragraph thereof.

(b) That the said defendants, Richard L. Lawson and John A. Grogan, their respective agents, servants, and employees, and all claiming or holding through or under them, or any or either of them, be temporarily and permanently restrained from further interfering with the possession of the shipment of whiskey hereinbefore mentioned in this bill of complaint; and from disposing of said shipment and the contents thereof, under the provisions of said Volstead Act.

(c) That defendants herein, their respective agents, servants, and employees, and all claiming or holding through or under them, or any or either of them, be compelled to deliver and return said shipment of whiskey to plaintiff herein or its duly authorized carrier, for such disposition thereof as may be lawful and not contrary to the rights of plaintiff in said whiskey.

(d) That the defendants, Richard L. Lawson and John A. Grogan, their respective agents, servants, employees and subordinates and

each and every one of them, and all other officials and employees of the Treasury Department of the United States and each and every one of them, be enjoined and restrained temporarily and permanently from in any manner enforcing or attempting to enforce or causing to be enforced against the plaintiff, its officers, servants, and employees, or any of them, and against the whiskey of plaintiff, any of the pains, penalties, or forfeiture provided in and by the national prohibition act, or the Regulations of the Secretary of the Treasury, supplemental thereto, on the grounds of or under the claims

that transshipping whiskey in bond, transported through the
16 United States, shipped from and destined to foreign coun-

tries, under the provisions of section 3005 of the Revised Statutes of the United States and the amendments thereto, is contrary to law, and that said defendants, John A. Grogan, his agents, servants, employees and subordinates, and each and every one of them, and all other officials and employees of the Treasury Department of the United States and each and every one of them, be enjoined and restrained from arresting or prosecuting the plaintiff, its officers, agents, servants, or employees, or any of them, for or on account of any alleged violation by them or any of them, of the terms of the national prohibition act or the Regulations of the Secretary of the Treasury promulgated thereunder on the grounds of or under the claims that transhipment of whiskey in bond transported through the United States, shipped from and destined to foreign countries, under the provisions of section 3005 of the Revised Statutes of the United States, and the amendments thereto, is contrary to law;

(e) That the said defendants, Richard I. Lawson and John A. Grogan, their respective agents, servants, employees and subordinates and each and every one of them, and all other officials and employees of the Treasury Department of the United States, and each and every one of them, be enjoined and restrained temporarily and permanently from forfeiting, seizing, stopping, hindering or molesting shipments of whiskey belonging to plaintiff, shipped from Walkerville, Ontario, in the Dominion of Canada, and entering any port in the United States for conveyance thence in transit in bond through any port of the United States to any other port therein for transshipment at the latter port to any foreign country where the delivery of said whiskey is intended to be made; as provided in and according to section 3005 of the Revised Statutes of the United States, as amended;

(f) That plaintiff herein may have such other and further relief in the premises as the court may deem proper.

HIRAM WALKER & SONS LTD.,
By (Sgd) HOBART A. SPRINGLE,
Its Secretary.

17 (Sgd.) LUCKING, HELFMAN, LUCKING & HANLAN,
Attorneys for Plaintiff, Business address,
1502 Ford Bldg., Detroit, Mich.

STATE OF MICHIGAN, *County of Wayne, ss:*

Hobart A. Springle, being duly sworn, deposes and says that he is the secretary of Hiram Walker & Sons, Ltd., the plaintiff named in the foregoing bill of complaint; that he signed said bill of complaint on behalf of said plaintiff and is duly authorized so to do; that he has read said bill of complaint and knows the contents thereof and that the same is true and of his knowledge except as to such matters as are therein stated to be on information and belief, and as to such matters he believes it to be true.

(Sgd.) HOBART A. SPRINGLE.

Subscribed and sworn to before me this 2nd day of August, A. D. 1921;

(Sgd.) FRANK THAYER NELSON,
Notary Public, Wayne County, Michigan.

My commission expires March 23, 1924.

Filed August 3rd, 1921.

ELMER W. VOORHEIS, *Clerk.*
 By CARRIE DAVISON, *Deputy Clerk.*

18 United States of America, in the District Court of the United States for the eastern district of Michigan, Southern Division.

In Equity.

HIRAM WALKER & SONS, INC., PLAINTIFF,
vs.

RICHARD I. LAWSON, COLLECTOR OF CUSTOMS
 for the port of Detroit, and John A. Grogan, collector of internal revenue, in said city of Detroit, Michigan, defendants.

No. 411.

Order to show cause and temporary restraining order.

On reading the bill of complaint filed in the above entitled cause, let the defendants herein show cause before this court at a term thereof, for a hearing of motions to be held at the Post-Office Building, in the city of Detroit, Michigan, on the 15th day of August, 1921, at nine o'clock in the forenoon or as soon thereafter as counsel can be heard.

(1) Why an order should not be made and entered, restraining the defendants, their agents, servants, and subordinates from forfeiting, seizing, stopping, hindering or molesting shipments of whisky belonging to plaintiff shipped from Walkerville, Ontario, in the Dominion of Canada, and entering any port in the United States for conveyance thence in transit in bond through any port of the United

States to any other port therein for transshipment at the latter port to any foreign country where the delivery of said whiskey is intended to be made as provided in and according to section 3005 of the Revised Statutes of the United States, as amended, and

19 (2) Why an order should not be made restraining the defendants, their agents, servants, and subordinates from in any manner enforcing or attempting to enforce or causing to be enforced against the plaintiff, its officers, servants or employees, or any of them, and against the whiskey of plaintiff any of the pains, penalties or forfeitures provided in and by the national prohibition act or the regulations of the Secretary of the Treasury supplemental thereto, on the grounds of or under the claims that transshipping whiskey in bond, transported through the United States, shipped from and destined to foreign countries, under the provisions of section 3005 of the Revised Statutes of the United States and the amendments thereto, is contrary to law; and

(3) Why an order should not be made restraining the said defendant, John A. Grogan, his agents, servants, employees and subordinates, and each and every one of them, from arresting or prosecuting the plaintiff, its officers, servants, agents, or employees or any of them, for or on account of any alleged violation by them or any of them, of the terms of the national prohibition act, or the regulations of the Secretary of the Treasury, promulgated thereunder, on the grounds of or under the claims that transshipping whiskey in bond transported through the United States, shipped from and destined to foreign countries, under the provisions of section 3005 of the Revised Statutes of the United States, and the amendments thereto, is contrary to law; and

(4) Why the plaintiff should not have such other and further relief as may be just.

(5) Sufficient cause appearing, service of a copy of this order on the defendants on or before the 8th day of August, 1921, shall be sufficient service, and it appearing to the court from the verified bill

20 of complaint filed in said cause that immediate and irreparable injury, loss and damage will result to the plaintiff in said cause before notice can be served and a hearing had thereon by reason of the fact that plaintiff has numerous bona fide orders for shipment of its whiskey for immediate delivery to its customers in the places and countries hereinafter mentioned, and unless the plaintiff is permitted to fill said orders in the usual course of business by transit in bond through the United States, plaintiff will probably lose its business in said countries and therefore the court deems it advisable to issue this temporary restraining order and grant the same without notice, now, therefore, on motion of Lucking, Helfman, Lucking & Hanlon, attorneys for Hiram Walker & Sons, Ltd., the plaintiff in said cause, it is hereby

Ordered, that the defendants Richard I. Lawson and John A. Grogan, their agents, servants, and subordinates, are hereby re-

strained from seizing, disturbing, removing or in any way interfering with any shipments of liquor made or to be made by said plaintiff from Walkerville, Ontario, through the United States by transit in bond, pursuant to the provisions of section 3005 of the Revised Statutes of the United States and the amendments thereto, to any of the following places and countries, to wit: Dutch West Indies, Dutch Guiana, Haiti, Cuba, Mexico, Guatemala, Spanish Honduras, Salvador, Nicaragua, Costa Rica, Republic of Panama, Colombia, Venezuela, Ecuador, or Peru, and it is further

Ordered, that this temporary restraining order shall expire ten days after the entry thereof unless within said time it shall be extended for a like period for good cause shown, pursuant to the statute in such case made and provided.

Dated August 6, 1921.

(Sgd.) ARTHUR J. TUTTLE,
United States District Judge.

Filed August 6th, 1921.

ELMER W. VOORHEIS, *Clerk.*
By CARRIE DAVISON, *Deputy Clerk.*

21 United States of America, District Court of the United States
for the Eastern District of Michigan, Southern Division.

In Equity.

HIRAM WALKER & SONS, LTD., PLAINTIFF,

vs.

RICHARD L. LAWSON, COLLECTOR OF CUSTOMS,
toms, and John A. Grogan, collector of
internal revenue, defendants.

No. 411.

Return to order to show cause and motion to dismiss.

The above defendants, by John E. Kinnane, United States attorney for the Eastern District of Michigan, in answer to the order heretofore made in the above-entitled cause requiring them to show cause why they should not be enjoined and restrained from interfering with the transportation and importation of whiskey from Ontario into the United States, and in transit to various foreign countries, move to dismiss the bill of complaint filed in said cause for the following reasons:

- (1) That it appears by the plaintiff's said bill of complaint that it is not entitled to the relief prayed.
- (2) There is no equity in said bill.
- (3) That the national prohibition act and regulations thereunder forbids such transshipment of whiskey.
- (4) That the treaty recited in said bill of complaint is abrogated by the act of Congress known as the national prohibition act, and the eighteenth amendment to the Constitution of the United States.

Wherefore the said defendants pray that the bill of complaint
 may be dismissed, and pray judgment of this honor-
 able court whether they shall be compelled to make any
 answer to said bill.

JOHN E. KINNANE,

United States Attorney for the Eastern District of Michigan.

Filed August 18, 1921.

ELMER W. VOORHEIS, *Clerk.*
 By CARRIE DAVISON, *Deputy Clerk.*

23 Order continuing temporary restraining order to August 26,
 1921.

United States of America, in the District Court of the United States
 for the Eastern District of Michigan, Southern Division.

In Equity.

HIRAM WALKER & SONS, LTD., PLAINTIFF,
 vs.

RICHARD L. LAWSON, COLLECTOR OF CUSTOMS FOR THE PORT
 of Detroit, and John A. Grogan, collector of internal
 revenue, in said city of Detroit, Michigan, defendant. } NO. 411.

It appearing to the court from the affidavit of Hobart A. Springle
 in said cause, that the plaintiff in said cause is in communication
 with the Chief of the Customs Division of the Treasury Department,
 at Washington, D. C., regarding the securing of proper in-
 structions to collectors of customs at the ports of exit from the United
 States, so that plaintiff may safely make shipments in bond through
 the United States pursuant to the terms of the restraining order
 heretofore granted herein under date of August 6, 1921, and that
 no final reply has yet been received from said Chief of Customs
 Division, and that irreparable injury will result to said plaintiff
 unless said restraining order is extended; now, therefore, on motion
 of Lucking, Helfman, Lucking & Hanlon, attorneys for the plain-
 tiff in said cause, it is hereby

24 Ordered, that the temporary restraining order heretofore
 issued in said cause under date of August 6, 1921, be and the
 same is hereby extended and continued in full force and effect until
 and including August 26, 1921.

Dated August 16, 1921.

(Sgd.) ARTHUR J. TUTTLE,
United States District Judge.

Filed August 16, 1921.

ELMER W. VOORHEIS, *Clerk.*
 By CARRIE DAVISON, *Deputy Clerk.*

25 United States of America, in the District Court of the United States for the Eastern District of Michigan, Southern Division. In Equity.

HIRAM WALKER & SONS, LTD., PLAINTIFF,
vs.

RICHARD I. LAWSON, COLLECTOR OF CUSTOMS
for the port of Detroit, and John A.
Grogan, collector of internal revenue in
said city of Detroit, Michigan, de-
fendants.

No. 411.

Answer of defendants to plaintiff's bill of complaint.

The answer of Richard I. Lawson, collector of customs for the port of Detroit, and John A. Grogan, collector of internal revenue for the Eastern District of Michigan, the above-named defendants to the bill of complaint filed in the above-entitled cause, respectfully shows:

- (1) Defendants admit the allegations contained in paragraph 1 of said bill of complaint.
- (2) Defendants admit the allegations contained in paragraph 2 of said bill of complaint.
- (3) Defendants admit the allegations contained in paragraph 3 of said bill of complaint, except as to the matters of law therein stated.
- (4) Defendants admit the allegations contained in paragraph 4 of said bill of complaint.
- (5) Defendants admit that article 29 of the treaty of 1871 is correctly stated in paragraph 5 of said bill of complaint.
- 26 (6) Defendants admit that the 18th amendment to the Constitution of the United States is correctly recited in paragraph 6 of said bill of complaint.
- (7) Defendants admit that section 3 of Title II of the national prohibition act is correctly recited in paragraph 7 of said bill.
- (8) Regarding the allegation contained in paragraph 8 of said bill of complaint that since said constitutional amendment and the national prohibition act became in force that plaintiff has ceased importing whiskey into the United States, but has continued under the regulations of the Secretary of the Treasury to convey said whiskey in transit, in bond, through the United States, pursuant to the statutes and treaty above mentioned, these defendants have no knowledge sufficient to either admit or deny the same, but aver that said allegation is immaterial to the determination of this cause.

Regarding the other allegations contained in said paragraph 8 as to the volume, character of business, and losses during transshipments in previous years, these defendants have no knowledge sufficient to admit or deny the same, but admit that the plaintiff is en-

gaged in said business and has been for many years, and further, defendants aver that said allegations are immaterial to a determination of this cause.

(9) Defendants admit the allegations contained in paragraph 9 of said bill of complaint.

(10) Defendants admit the allegations contained in paragraph 10 of said bill of complaint.

(11) Defendants admit the allegations contained in paragraph 11 of said bill of complaint.

27 (12) Defendants admit the allegations contained in paragraph 12 of said bill of complaint.

(13) Defendants admit the allegations contained in paragraph 13 of said bill of complaint.

(14) Defendants admit the allegations contained in paragraph 14 of said bill of complaint.

(15) The defendants admit that under the provisions of the national prohibition act and regulations duly made to carry the same into effect, and under the interpretation made by the Secretary of the Treasury of said act, that criminal proceedings may be instituted against the plaintiff and its property offered for transshipment, in bond, from Canada to Mexico and other foreign countries, through portions of the United States, as alleged in paragraph 15 of said bill, but deny the allegation therein contained as to the legal effect of the 18th amendment to the Constitution of the United States and of the national prohibition act.

(16) The defendants deny the conclusions of law and interpretation of the national prohibition act and the 18th amendment to the Constitution of the United States, and the application of the Revised Statutes of the United States for the transshipment of whiskey, in bond, as set forth in paragraph 16 of said bill of complaint.

(17) Defendants admit the allegation contained in paragraph 17 of said bill that the practice of transshipment in bond, of liquors from Canada to other foreign countries through the United States has been exercised for a great many years past and that since the adoption of the national prohibition act the same practice has continued without interference until the seizures mentioned in said

bill of complaint, but as to whether said privilege has been 28 used as a cover for smuggling liquor into the United States

by plaintiff, these defendants say that plaintiffs have not used said practice as a cover for smuggling liquor into this country; but regarding the further allegation that plaintiff is informed and believes that no claim has ever been made by officers of the United States Government that there have been any such violations or that the further exercise of the privilege will result in introducing liquors into the United States in violation of law, defendants aver that the continued shipment of liquor through the United States, from Canada to foreign countries will result in violations of the national

prohibition act, and a portion of said liquor will remain in the United States in violation of law.

Regarding the allegations in said paragraph that said practice was sanctioned by the legal department of four different branches of the Government, defendants have no knowledge sufficient to admit or deny the same, but aver that said practice and said interpretation are immaterial to the determination of this cause.

(18) Defendants admit the allegations contained in paragraph 18 of said bill except so much thereof as charges that the acts of the defendants will be in violation of the Constitution and laws of the United States, and of the treaty hereinbefore referred to.

(19) Defendants admit the allegations contained in paragraph 19 of said bill of complaint.

(20) Defendants admit the allegations contained in paragraph 20 of said bill of complaint.

(21) Regarding the allegations of damage in paragraph 21, defendants have no knowledge sufficient to admit or deny the 29 same, but do know that the plaintiff is engaged in the business of manufacturing and selling whiskey and has been for many years, and that shipments are made to foreign countries, but regarding the delays and obstacles in the way of prompt shipments, as set forth in said paragraph, the defendants are not advised, and aver that the same are immaterial to a determination of this cause.

The defendants, further answering said bill of complaint, aver that if shipments of whiskey are permitted to be transported from Canada to other foreign countries, through the United States, by way of Detroit and the Eastern District of Michigan, as prayed by the plaintiff, that said cars may be entered by violators of the law and said whiskey removed while in the United States; that the cars in which whiskey is shipped are not proof against thieves and that large quantities of merchandise are continually stolen from interstate shipments of all kinds of merchandise, and that the cars containing said whiskey may be easily entered by the breaking of the seals and the contents removed en route through the United States, except where detectives accompany said shipments, and even in such cases losses have been and will be sustained.

For the above reasons and the other reasons contained in defendants' motion to dismiss heretofore filed, defendants say that the relief prayed for should be denied and the bill of complaint dismissed.

RICHARD L. LAWSON,
Collector of Customs.

JOHN A. GROGAN,
Collector of Internal Revenue.

By CLARENCE NEELY,
Chief Office Deputy Collector.

JOHN E. KINNANE,
U. S. Attorney.

F. L. EATON,
Assistant U. S. Attorney for defendants.

Stipulation of counsel waiving proofs.

Filed August 18, 1921.

ELMER W. VOORHEIS, *Clerk,*
CARRIE DAVISON, *Deputy Clerk.*

United States of America, in the District Court of the United States for the Eastern District of Michigan, Southern Division. In Equity.

HIRAM WALKER & SONS, LTD., PLAINTIFF,
v.s.

RICHARD I. LAWSON, COLLECTOR OF CUSTOMS FOR
the port of Detroit, and John A. Grogan,
collector of internal revenue in said city of
Detroit, Michigan, defendants.

No. 411.

It is hereby stipulated by and between the parties to the above-entitled cause, by their respective attorneys, that inasmuch as the issues presented by the bill of complaint and answer filed thereto are questions of law and the facts are before the court as set forth in the bill of complaint, answer, and this stipulation, that it is unnecessary to take proofs in said cause, the aforesaid questions of law being controlling and decisive.

It is further stipulated and agreed that the case proceed to a final decree without taking of proofs and that the taking of proofs herein be dispensed with.

It is further stipulated that the whiskey in controversy was and is intended for consumption as beverage whiskey but the plaintiff does not admit the materiality of the manner of the use thereof.

LUCKING, HELFMAN, LUCKING & HANLON,
Attorneys for plaintiff.

JOHN E. KINNANE,
*United States Attorney for the Eastern
District of Michigan, for defendants.*

August 17, 1921.

F. L. EATON, *Assistant U. S. Attorney.*

Filed August 18, 1921.

ELMER W. VOORHEIS, *Clerk.*
By CARRIE DAVISON, *Deputy.*

31 In the United States District Court of America, Eastern District of Michigan, Southern Division, in Equity.

HIRAM WALKER & SONS, LTD., PLAINTIFF,
v.

RICHARD I. LAWSON & JOHN A. GROGAN, DEFENDANTS.

No. 411.

Messrs. Lucking, Helfman, Lucking & Hanlon, of Detroit, attorneys for plaintiff.

Hon. John E. Kinnane, U. S. district attorney, and Fred. L. Eaton, asst. district attorney.

Opinion.

TURTLE, District Judge: This is a bill for an injunction to restrain the defendants, one of whom is the United States collector of customs, and the other the collector of United States internal revenue, for this district, from interfering with shipments, by the plaintiff, of intoxicating liquor from Canada to Mexico and other foreign countries, through the United States. The question involved is whether such shipments are unlawful under the national prohibition act.

The material facts alleged in the bill of complaint are as follows: Plaintiff is a corporation organized and doing business under the laws of the Province of Ontario, Canada, is a resident of 32 Walkerville in said Province, and is a subject of Great Britain.

For more than thirty years it has been manufacturing and distilling in Walkerville whiskey which it has been selling and shipping to various foreign countries. During these years, plaintiff has conveyed its whiskey from Walkerville to a port of the United States and in transit therefrom through the United States to other foreign countries as authorized by a certain treaty between the United States and Great Britain, and pursuant to a certain statute of the United States. The treaty in question was proclaimed July 4th, 1871, and contains the following provision:

"It is agreed that, for the term of years mentioned in Article XXXIII of this treaty, goods, wares or merchandise arriving at the ports of New York, Boston, and Portland and any other ports in the United States which have been or may, from time to time, be specifically designated by the President of the United States and destined for her Britannic Majesty's possessions in North America, may be entered at the proper customhouse and conveyed in transit without the payment of duties through the territory of the United States, under such rules, regulations and conditions for the protection of the revenue as the Government of the United States may from time to time prescribe; and under like rules, regulations and conditions, goods, wares or merchandise may be conveyed in transit without the payment of duties, from such possessions through the territory of the United States for export from the said ports of the United States."

The statute referred to is section 3005 of the United States Revised Statutes, which provides as follows:

"All merchandise arriving at any port of the United States destined for any foreign country, may be entered at the customhouse, and conveyed, in transit, through the territory of the United States, without the payment of duties, under such regulations as to examination and transportation as the Secretary of the Treasury may prescribe."

After the time of the taking of effect of the 18th amendment and of the national prohibition act, plaintiff ceased to import whiskey into the United States, but has continued, under the regulations

of the United States Treasury Department, to convey whiskey in transit, in bond, through the United States pursuant to said treaty and statute, such whiskey entering the United States from Canada and being destined for foreign countries. If plaintiff were compelled to ship its whiskey to Mexico, Central America, and South America otherwise than in bond, through the United States, the increase in freight and transportation charges, cost of handling and delays caused in making deliveries would be so great as to largely impair, if not entirely destroy, the business of the plaintiff in such foreign countries. Shortly before the filing of its bill of complaint herein, plaintiff presented a shipment of its whiskey to the agent of the defendant collector of customs at the port of Detroit in this district, to be conveyed, in transit, in bond, through the United States to the country of Mexico, to be there delivered to plaintiff's customers residing in said country. It duly complied with all applicable laws (except the national prohibition act, if that be applicable) and regulations. Up to this time neither defendant had interfered with any such shipment. Plaintiff executed its bond in due form and its said shipment was delivered to a common carrier in Detroit for conveyance in transit, in bond, through the United States to Mexico. Shortly thereafter the defendant collector, claiming to act pursuant to the provisions of the national prohibition act, seized said shipment while it was still in the possession of said common carrier for said through shipment, and refused to allow it to proceed, on the ground that it was being transported contrary to the terms of the eighteenth amendment and of the national prohibition act. Plaintiff is unable to obtain a permit for said or any similar shipment of intoxicating liquors in bond from Canada through the United States to a foreign country and the defendants will interfere with, and prevent, any such shipment unless restrained by injunction.

By appropriate averments, the bill alleges that irreparable injury will be sustained by it unless the injunction prayed be granted. The bill alleges that the suit arises under the Constitution and laws and treaties of the United States, and that the matter in controversy exceeds the jurisdictional sum of \$3,000, exclusive of interest and costs. The cause is now before the court on the bill, a motion to dismiss, an answer not denying the foregoing facts, and a stipulation that "as the issues presented by the bill of complaint and answer filed thereto are questions of law, and the facts are before the court as set forth in the bill of complaint, answer, and this stipulation that it is unnecessary to take proofs in said cause, the aforesaid questions of law being controlling and decisive, that the case proceed to a final decree without taking of proofs, and that the taking of proofs herein be dispensed with; and that the whiskey in controversy was and is intended for consumption as beverage whiskey but the plaintiff does not admit the materiality of the manner of the use thereof."

As already indicated, the ultimate question presented for decision is whether the national prohibition act properly construed, forbids

the transportation of intoxicating liquor from Canada to a foreign country by transshipment in bond, through the United States 35 under regulations pursuant to the treaty and statute already quoted. The solution of this question involves, and depends upon, the proper interpretation of said national prohibition act, popularly known as the "Volstead Act." This statute was, of course, passed for the purpose of enforcing the eighteenth amendment, which provides as follows:

Does this section of the statute forbid the making of the transhipment in question? It is clear enough and is, I understand, conceded by plaintiff, that under a strict construction of the language just quoted from such statute, the latter is sufficiently broad in its terms to prohibit the shipments under consideration since it is undoubtedly necessary, in order to make such shipments, to both "possess" and "transport" intoxicating liquor within the United States. It is likewise probably true, as is apparently also conceded, that this statute, even thus strictly construed, would be a valid exercise of the power, expressly conferred on Congress by the eighteenth amendment, to enforce such amendment by "appropriate legislation."

It is, however, equally certain that in attempting to interpret the meaning of this statute the words used must be read in the light of the mischief aimed at, and of the purpose sought to be accomplished by its enactment. The primary factor in determining the proper construction of such statute must be a consideration of the design and intention of Congress in enacting it, and if such intention can be ascertained, that, and not the literal import of the language employed, must control. It must be borne in mind that not only may the same words have different meanings in different connections, but also that "a thing may be within the letter of a statute and yet not within the statute because not within its spirit nor within the intention of its makers." *Holy Trinity Church v. United States*, 143 U. S. 457, 36 L. Ed. 226; *Lau v. United States*, 144 U. S. 47, 36 L. Ed. 340; *Taylor v. United States*, 207 U. S. 120, 52 L. Ed. 130; *American Security & Trust Company v. District of Columbia*, 224 U. S. 491, 56 L. Ed. 856; *Street v. Lincoln Safe Deposit Company*, 254, U. S. 88, 65 L. Ed. 7; 41 Supreme Court Reporter, 31 (advance sheets).

It will be noted that the language of the eighteenth amendment, already quoted, applies and limits the prohibitory terms thereof to intoxicating liquors intended for "beverage purposes"; and that Congress, by section 3 of title 2 of the Volstead Act, expressed its intention that such act should be construed "to the end that the use of intoxicating liquor as a beverage may be prevented." In view of these references to the object of this legislation, and of the common knowledge of the territorial limitations upon the scope and effect of congressional action, it can not be doubted that the purpose underlying the enactment of this statute was the prevention of the use of intoxicating liquor as a beverage within the United 37 States and the territory subject to the jurisdiction thereof.

Street v. Lincoln Safe Deposit Company, *supra*. This purpose, then, must be carefully kept in mind in seeking to arrive at a correct interpretation of the language employed.

It is another established and recognized principle of statutory construction that repeals by implication are not favored, and that a later statute will not be held to have impliedly repealed an earlier one unless full effect can not be reasonably given to both. *United States v. Lee Yen Tai*, 185 U. S. 213, 46 L. Ed. 878; *Ex parte Webb*, 225 U. S. 663, 56 L. Ed. 1248; *Washington v. Miller*, 235 U. S. 422, 59 L. Ed. 295.

It is equally well settled that a treaty between the United States and a foreign country will not be regarded as abrogated, and rights created thereby taken away, by a subsequent statute, by implication, unless an intention to that effect is clearly and unequivocally indicated by the necessary operation of such statute, it being presumed until the contrary is plainly manifest that Congress intends no interference with such treaty rights; and it is only where the provisions of a treaty and the terms of a later statute are in irreconcilable conflict and can not both remain in force, that the former will be considered as impliedly repealed by the latter. *Chow Heong v. United States*, 112 U. S. 536, 28 L. Ed. 770; *Frost v. Wenie*, 157 U. S. 46, 39 L. Ed. 614; *U. S. v. Gue Lim*, 176 U. S. 459, 44 L. Ed. 544.

It is necessary to consider a contention presented, but apparently not very earnestly pressed, by the Government, that the provision of the treaty here involved, article 29, ceased to be operative prior to the passage of the national prohibition act. As already noted in

the extract therefrom previously quoted, the said article was,
38 by its terms, to remain in force "for the term of years men-

tion in article 33 of this treaty." Article 33 does not mention article 29, but provides that certain other specified articles of the treaty, relating to fisheries, "shall remain in force for the period of ten years from the date at which they may come into operation and, further, until the expiration of two years after either of the high contracting parties shall have given notice to the other of its wish to terminate the same." It is argued in this connection that as these articles specified in article 33 have been long since abrogated, in accordance with the provisions of the treaty, therefore the "term of years mentioned in article 33," during which article 29 was to continue in force, has terminated. With this contention I can not agree. I am satisfied that the reference in article 29 to article 33 was prompted by a desire to adopt, for article 29, the same period of life as that "mentioned in article 33," without an unnecessary repetition, in article 29, of the somewhat cumbrous provisions of article 33. When the articles thus specified in article 33 were subsequently terminated, no mention was made of article 29. The latter has never been expressly abrogated; has been treated as in force, and acted upon, by the executive officials of both Canada and of the United States for more than fifty years; and is, in my opinion, still in effect.

Bearing in mind, then, the canons of construction referred to, and applicable to an inquiry into the meaning and effect of the national prohibition act with respect to the matter in controversy, it is to be observed that at the time of the adoption of said act a treaty between this Nation and Great Britain was in effect, granting to the subjects of the latter, including the plaintiff herein, the right to convey goods, wares, or merchandise in transit from Canada through the territory of the United States in transit to other countries, subject only to the rules and regulations therein referred to. There was also at that time in force a Federal statute, obviously enacted in furtherance of the object of said treaty, such statute providing that "all merchandise arriving at any port of the United States destined for any foreign country, may be entered at the customhouse, and conveyed, in transit, through the territory of the United States, without the payment of duties, under such regulations as to examination and transportation as the Secretary of the Treasury may prescribe." Knowing, as it must of course be held to have known, of the existence and terms of this treaty and statute, Congress enacted legislation containing prohibitory provision couched in broad and general terms, but clearly designed to prevent the use of intoxicating liquor for beverage purposes within the United States and the territory subject thereto. Congress, of course, had no right or power to forbid any use or disposition of intoxicating liquor outside of such territory, and there is no reason for the assumption or room for the inference that it entertained any such intention. *United States v. Palmer*, 3 Wheaton 610, 4 L. Ed. 410. What warrant, then, is there for ascribing to Congress a purpose (not expressed by that body, as it would have been easy and, if intended, natural to have done) to prohibit the shipping of liquor not intended for, or capable of, use for beverage or any other purpose in the United States, and transported, not into, but through, the United States. (*United States v. Gudger*, 249 U. S. 373, 63 L. Ed. 653; *McLean v. Hager*, 31 Fed. 602) in accordance with a treaty then in existence and not expressly abrogated or otherwise mentioned in the statute which is claimed to have indicated such a purpose.

I am unable to find in the language of the statute, read and considered in the light of all the surrounding circumstances, the clear evidence of such a purpose which should appear in order to justify such a construction. I am of the opinion that the national prohibition act does not indicate any intention to forbid the conveyance of intoxicating liquors in transit in bond from Canada through the United States to foreign countries under the provisions of the treaty and statute authorizing such conveyance, and pursuant to proper rules and regulations by the executive officials having charge thereof.

It is urged by the Government that the prohibition in the statute against the exportation of intoxicating liquor from the United States negatives an intention to confine its application to the use of such liquor within the United States. This argument overlooks the close

relation between manufacture and exportation and the incentive to engage in the former which is furnished by the right to engage in the latter; and it was doubtless considered, and not without reason, that to forbid the exportation of intoxicating liquor from, would tend to make easier the enforcement of the prohibition against its manufacture and possession in, the United States. It can not, however, be said that such a relation exists between the transshipments in question and the prevention of the use of intoxicating liquor as a beverage within the United States. To hold otherwise would be in effect to ignore the efficacy and effect of the protection afforded such transhipment by the United States customs officers and other officials under whose supervision they are conveyed in transit through the United States. It was evidently the belief of Congress,
41 in providing for such conveyance, that goods under such supervision could be safely left to proceed without interruption through this country to their destination beyond its borders, and that they could therefore be legitimately exempted from the payment of the customs charges to which they would otherwise be subject. In view of the presumption in favor of the performance by public officers of the duties imposed upon them, and giving to the operation of the customs rules and regulations the same consideration and weight apparently accorded by Congress, I conclude that conveyances of intoxicating liquor in transit under the rules and regulations applicable and in control of the proper officials were not regarded by Congress as falling within the scope of the evils sought to be remedied by the national prohibition act, or as having such a substantial relation thereto as to call for their inclusion among the acts forbidden by that statute.

Finally, it is argued that because section 20 of title 3 of the statute, applicable solely to the Canal Zone, expressly provides "that this section shall not apply to liquor in transit through the Panama Canal or on the Panama Railroad," therefore the absence of such an express provision from the portions of the statute not relating to the Canal Zone indicates a purpose to make those portions of the act applicable to liquor in transit. This contention can not be sustained. Its lack of merit is made apparent not only by the observation that it is merely from the operation of "this section" that the liquor in transit referred to is exempted, but also by a consideration of the fact that the absence of any applicable treaty furnishes a probable, if not necessary, reason, for an express exemption from the operation of section 20, of "in transit" shipments of liquor through the Canal Zone,

42 whereas there was no necessity or occasion for such an express exemption with respect to "in transit" conveyances from Canada through the United States, the latter being protected by treaty provisions not repealed by the national prohibition act.

The arguments advanced by the Government rests, in the last analysis, upon the ultimate contention that to "transport" or "possess" intoxicating liquor, except as expressly authorized by the Volstead Act, is forbidden by that act. It has, however, already

been distinctly held by the Supreme Court that these words are not to be so interpreted but that a transportation, or possession, of intoxicating liquor necessarily connected with, and incidental to, an act not within the prohibition, because not within the spirit and true meaning, of the statute, is not a violation thereof. *Street v. Lincoln Safe Deposit Company, supra.*

For the reasons and from the conclusions thus expressed, it necessarily results that the injunction prayed should be granted, and an order will be entered in conformity with the terms of this opinion.

ARTHUR J. TUTTLE,
District Judge.

Dated, Detroit, Michigan, August 23rd, 1921.

Filed August 23, 1921.

ELMER W. VOORHEIS, *Clerk,*
By CARRIE DAVISON, *Deputy Clerk.*

43 United States of America, in the District Court of the United States for the Eastern District of Michigan, Southern Division. In Equity.

HIRAM WALKER & SONS, LTD., PLAINTIFF,
vs.

RICHARD I. LAWSON, COLLECTOR OF CUSTOMS FOR THE PORT of Detroit, and John A. Grogan, collector of internal revenue, in said city of Detroit, Michigan, defendants.] No. 411.

Decree.

At a session of said court held at Detroit, Michigan, in said district, on the 23rd day of August, 1921.

Present: Hon Arthur J. Tuttle, United States district judge.

This cause came on to be heard at this term and was argued by counsel, and decreed as follows, viz:

(1st) That the allegations of material facts contained in the bill of complaint are true.

(2nd) That the said defendants, Richard I. Lawson, and John A. Grogan, their respective agents, servants, and employees and all claiming or holding through or under them, or any or either of them, and all other officials, agents and employees of the Treasury Department of the United States, and each and every one of them, be and they are hereby, restrained permanently from interfering with the possession of the shipment of 25 cases of whiskey presented

by the said plaintiff, Hiram Walker & Sons, Ltd., on February 44 14, 1921, to the agents of the said defendant Richard I. Lawson, at the port of Detroit, State of Michigan, to be conveyed in transit in bond through the United States to the country of

Mexico, via the port of New Orleans, each of said twenty-five cases, numbered 1 to 25, respectively, being marked as follows:

"A. T. M. Port of Detroit.

Mexico.

Vera Cruz. In bond for New Orleans,"

and that said defendants, officials, agents, servants, and employees, and each of them be, and they are hereby, further restrained permanently from interfering, directly or indirectly, with the conveyance of the aforesaid merchandise in bond to the country of Mexico as aforesaid. And further, that in the event the said plaintiff for any reason desires the return of said whiskey to it at Walkerville, in the Province of Ontario, Dominion of Canada, then that the aforesaid parties, and each and every one of them, be and they are hereby restrained from interfering with the delivery of said merchandise to the plaintiff and the return thereof to the plaintiff at said city of Walkerville, for such disposition thereof as may be lawful and not contrary to the rights of the plaintiff in said whiskey.

(3d) That the defendants, Richard I. Lawson and John A. Grogan, their respective agents, servants, and employees and all claiming or holding through or under them, or any or either of them, and all other officials, agents, and employees of the Treasury Department of the United States, and each and every one of them, be and they are hereby enjoined and restrained permanently from enforcing or attempting to enforce, or causing to be enforced against the plaintiff, its officers, servants, and employees, or any of them, and against the

whiskey of the said plaintiff, any of the pains, penalties, or
forfeitures provided in and by the national prohibition act
also known as the Volstead Act), or the regulations of the

Secretary of the Treasury supplemental thereto, on the grounds of or under the claims that conveying whiskey in bond through the United States, shipped from and destined to foreign countries, under the provisions of section 3005 of the Revised Statutes of the United States and the amendments thereto, and the regulations thereunder, is contrary to law, and that said defendant John A. Grogan, his agents, servants, employees, and subordinates and each and every one of them, and all other officials, agents, and employees of the Treasury Department of the United States, and each and every one of them, be and they are hereby enjoined and restrained permanently from arresting or prosecuting the plaintiff, its officers, agents, servants, or employees, or any of them for or on account of any alleged violation by them or any of them of the terms of the said national prohibition act or the regulations of the United States Secretary of the Treasury promulgated thereunder on the grounds of or under the claims that conveying whiskey in bond through the United States, shipped from and destined to foreign countries, under the provisions of section 3005 of the Revised Statutes of the United States, and the amendments thereto, and the regulations thereunder, is contrary to law.

(4th) That the said defendants, Richard I. Lawson and John A. Grogan, their respective agents, servants, and employees, and all

claiming or holding through or under them, or any or either of them, and all other officials, agents, and employees of the Treasury Department of the United States, and each and every one of them, be and they are hereby enjoined and restrained permanently
 46 from forfeiting, seizing, stopping, hindering, molesting, or interfering with shipments of whiskey made by plaintiff, from Walkerville, Ontario, or elsewhere, in the Dominion of Canada, destined for any foreign country, and entering any port in the United States for conveyance thence in transit in bond through the United States to any other port therein for transshipment at the latter port and conveyance thence to any foreign country where the conveyance of said whiskey through the United States is to be made, as provided for in and according to section 3005 of the Revised Statutes of the United States, as amended, and the regulations thereunder.

ARTHUR J. TUTTLE,
United States District Judge.

Filed, August 23, 1921.

ELMER W. VOORHEIS, *Clerk,*
 By CARRIE DAVISON, *Deputy Clerk.*

47 United States of America, in the District Court of the United States for the Eastern District of Michigan, Southern Division.

In Equity.

HIRAM WALKER & SONS, LTD., PLAINTIFF,
vs.

JOHN A. GROGAN, COLLECTOR OF INTERNAL REVENUE for the first district of Michigan, and Richard I. Lawson, collector of customs for the first district of Michigan, defendants.

No. 411.

Assignments of error.

And now come the above-named defendants, by John E. Kinane, United States attorney for the Eastern District of Michigan, and say that the District Court who rendered the final decree in the above entitled cause erred in the following particulars, to wit:

I.

The court erred in holding that the national prohibition act does not forbid the transportation of intoxicating liquor intended for beverage purposes from Canada to a foreign country, by transshipment, in bond, through the United States.

II.

The court erred in holding that the treaty between Great Britain and the United States proclaimed July 4, 1871, was not abrogated

by the adoption of the eighteenth amendment to the Constitution of the United States and the passage of the national prohibition act so far as said treaty relates to intoxicating liquors for beverage purposes.
48

III.

The court erred in holding that the treaty between Great Britain and the United States proclaimed on July 4, 1871, was not abrogated and terminated by the executive branch of the United States prior to the adoption of the eighteenth amendment to the Constitution of the United States and the passage of the national prohibition act, so far as said treaty relates to the transshipment of merchandise from the British possessions to foreign countries and through the United States.

IV.

The court erred in holding that section 3005 of the Revised Statutes of the United States was not repealed by the national prohibition act so far as said section pertains to intoxicating liquor for beverage purposes.

V.

The court erred in holding that the national prohibition act and the regulations lawfully promulgated thereunder permit the transportation of intoxicating liquor from Canada to a foreign country, by transshipment in bond, through the United States, under regulations pursuant to the treaty aforesaid and section 3005 Revised Statutes of the United States.

VI.

The court erred in holding that the regulations promulgated and adopted under section 3005, Revised Statutes of the United States,
49 permit the transportation of intoxicating liquor intended for beverage purposes from Canada to Mexico, by transshipment in bond, through the United States.

JOHN E. KINNANE,
United States Attorney, Eastern District of Michigan.

FRED L. EATON,
Assistant U. S. Attorney.

We acknowledge timely service of the foregoing assignments of error.

LUCKING, HELFMAN, LUCKING & HANLON,
Attorneys for Plaintiff.

Filed August 24th, 1921.

ELMER W. VOORHEIS, *Clerk,*
By CARRIE DAVISON, *Deputy Clerk.*

- 50 United States of America, in the District Court of the United States for the Eastern District of Michigan, Southern Division.

In Equity.

HIRAM WALKER & SONS, LTD., PLAINTIFF,

vs.

JOHN A. GROGAN, COLLECTOR OF INTERNAL revenue for the first district of Michigan and Richard L. Lawson, collector of customs for the first district of Michigan, defendants.

No. 411.

Additional assignments of error.

Said court erred in holding that the treaty between Great Britain and the United States, proclaimed July 4, 1871, was not abrogated and modified by the adoption of the 18th amendment to the Constitution of the United States and the passage of the national prohibition act, commonly called the Volstead Act, thereunder, so far as said treaty established the right to transport by shipment through the United States, to foreign countries, merchandise which consisted of intoxicating liquors intended for beverage purposes, in bond, thereby holding and deciding that the right of such shipment through the United States to foreign countries, in bond, was not terminated and taken away by said constitutional amendment and said national prohibition act, or either of them.

IX.

51 The court erred in holding and deciding that said constitutional amendment and said national prohibition act should be construed as not conflicting with or interfering with the right of transshipment of merchandise which consisted of intoxicating liquor for beverage purposes, through the United States, which existed prior to the adoption of said act and said constitutional amendment, under the aforesaid treaty between the United States and Great Britain.

X.

The court erred in holding and deciding that the right of transshipment of merchandise from Canada through the United States to foreign countries, which existed under the treaty aforesaid, was not terminated and taken away by the adoption of the aforesaid constitutional amendment and the national prohibition act.

XI.

The court erred in permanently restraining the above named defendants, their agents and servants, and all officers, agents and

servants of the Treasury Department of the United States, from preventing or interfering with any shipments of intoxicating liquor intended for beverage purposes by said plaintiff, through the United States, intended for any foreign country or port; and also from interfering with or preventing the return by like shipment of any part of said intoxicating liquor.

JOHN E. KINNANE,

United States Attorney,

Eastern District of Michigan, for Defendants.

52 It is hereby stipulated and agreed by and between the parties to the above-entitled cause, by their respective attorneys, that the above assignments of error, Nos. VIII to XI, may be filed in said cause which is appealed to the United States Supreme Court, without prejudice to said appeal.

LUCKING, HELFMAN, LUCKING & HANLON,
Attorneys for Plaintiff.

JOHN E. KINNANE,

United States Attorney,

Eastern District of Michigan, for Defendants.

ELMER W. VOORHEIS, *Clerk.*

Filed Sept. 12, 1921.

53 United States of America, in the District Court of the United States for the Eastern District of Michigan, Southern Division.

In Equity.

HIRAM WALKER & SONS, LTD., A CORPORATION ORGANIZED
and existing under and by virtue of the laws of the
Dominion of Canada, plaintiff,

vs.

JOHN A. GROGAN, COLLECTOR OF INTERNAL REVENUE FOR
the first district of Michigan, and Richard I. Lawson,
collector of customs for the Eastern District of Michigan, defendants.

No. 411.

Claim of appeal and order allowing same.

John A. Grogan, collector of internal revenue for the first district of Michigan, and Richard I. Lawson, collector of customs for the eastern district of Michigan, defendants in the above-entitled cause, conceiving themselves aggrieved by the final decree entered on the 23d day of August, A. D. 1921, in the above entitled cause, do hereby appeal from said decree to the Supreme Court of the United States, and they pray, that this, their appeal, may be allowed, and that the transcript of the record, together with the assignments of error and proceedings and papers upon which the said decree was

made, duly authenticated, may be sent to the Supreme Court of the United States.

Dated this 24th day of August, in the year of our Lord one thousand nine hundred and twenty-one.

JOHN E. KINNANE,
United States Attorney,

Eastern District of Michigan, for defendants.

54 Now, on to wit, this 24th day of August, in the year of our Lord one thousand nine hundred and twenty-one, it is ordered, that the appeal in the above-entitled cause be and the same is allowed as prayed for, and that the defendants be not required to file any bond on such appeal, they being public officials.

ARTHUR J. TUTTLE,
United States District Judge.

Filed August 24, 1921.

ELMER W. VOORHEIS, *Clerk.*
By CARRIE DAVISON, *Deputy.*

55 Supreme Court of the United States.

UNITED STATES OF AMERICA,

Sixth Judicial Circuit, ss:

To Hiram Walker & Sons, Ltd., a corporation organized and existing under the laws of the Dominion of Canada, greeting:

You are hereby cited and admonished to be and appear at a session of the Supreme Court of the United States to be holden at the city of Washington, D. C., on the 23rd day of September next pursuant to an appeal filed in the clerk's office of the District Court of the United States for the Eastern District of Michigan, wherein John A. Grogan, collector of internal revenue for the 1st district of Michigan, and Richard I. Lawson, collector of customs for the eastern district of Michigan, are appellants and you are appellee to show cause, if any there be, why the decree rendered against the said appellants in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable William H. Taft, Chief Justice of the United States, this 24th day of August in the year of our Lord one thousand nine hundred and twenty-one, and of the Independence of the United States of America the one hundred and forty-sixth.

ARTHUR J. TUTTLE,
*United States District Judge for the
Eastern District of Michigan.*

Due and timely service of the within citation is hereby accepted

LUCKING, HELFMAN, LUCKING & HANLON,
Solicitors for Appellee.

56 United States of America, in the District Court of the United States for the Eastern District of Michigan, Southern Division.

In Equity.

HIRAM WALKER & SONS, LTD., PLAINTIFF.

v.s.

JOHN A. GROGAN, COLLECTOR OF INTERNAL
revenue for the first district of Michigan,
and Richard I. Lawson, collector of cus-
toms for the eastern district of Michigan,
defendants.

No. 411.

Designation of record.

And now come the above-named defendants, by John E. Kinnane,
United States attorney for the eastern district of Michigan, and designates the following papers as those which shall constitute the record on appeal in the above entitled cause:

1. Bill of complaint.
2. Order to show cause and temporary restraining order.
3. Return to order to show cause and motion to dismiss.
4. Order continuing temporary restraining order to August 26, 1921.
5. Answer of defendants.
6. Stipulation by counsel waiving proofs.
7. Memorandum of opinion on final decree.
8. Final decree.
9. Assignments of error.
10. Claim of appeal, by defendants.
- 57 11. Order allowing appeal.
12. Citation.

J. E. KINNANE,
United States Attorney,
Eastern District of Michigan, for Defendants.

F. L. EATON,
Assistant, U. S. Attorney.

Detroit, Michigan, August 26, 1921.

We acknowledge timely service of the foregoing designation of record.

LUCKING, HELFMAN, LUCKING & HANLON,
Attorneys for Plaintiff.

Filed August 26th, 1921.

ELMER W. VOORHEIS, *Clerk.*
CARRIE DAVISON, *Deputy Clerk.*

58 At a session of the District Court of the United States for the Eastern District of Michigan, continued and held pursuant to adjournment at the District Court room in the city of Detroit, in said district, on the Friday the twenty-third day of September in the year of our Lord one thousand nine hundred and twenty-one.

Present: The Honorable Arthur J. Tuttle, United States district judge.

HIRAM WALKER & SONS, LTD.,
vs.
RICHARD I. LAWSON and JOHN A. GROGAN. } No. 411.

Upon the application of the clerk of this court, for cause shown, it is by the court now here ordered that the time in which to file and docket printed record on appeal in this cause, be and the same is hereby extended to and including the 23rd day of November, A. D. 1921.

ARTHUR J. TUTTLE,
United States District Judge.

(Endorsement:) No. 411. United States District Court, Eastern District of Michigan, Southern Division. Hiram Walker & Sons, Ltd., vs. Richard I. Lawson and John A. Grogan. Order extending time to file and docket printed record of appeal to Nov. 23, 1921. Filed Sept. 23rd, 1921. Elmer W. Voorheis, clerk, Lew W. Levinson, deputy clerk.

59 United States of America, in the District Court of the United States for the Eastern District of Michigan.

HIRAM WALKER & SONS, LTD., PLAINTIFF,
vs.

JOHN A. GROGAN, COLLECTOR OF INTERNAL
REVENUE FOR THE FIRST DISTRICT OF MICHIGAN,
AND RICHARD I. LAWSON, COLLECTOR OF CUS-
TOMS FOR THE FIRST DISTRICT OF MICHIGAN, DEFENDANTS.

No. 411. In Equity.

EASTERN DISTRICT OF MICHIGAN.
Southern Division, ss:

I, Elmer W. Voorheis, clerk of the District Court of the United States for the Eastern District of Michigan, do hereby certify and return to claim of appeal of John A. Grogan, collector of internal revenue for the first district of Michigan, and Richard I. Lawson, collector of customs for the first district of Michigan, in the above entitled cause, that the attached and foregoing is a true copy of the record and proceedings in said cause as the same appears of record and on file in my office; that I have compared the same with the originals, and it is a true and correct transcript therefrom and of the whole thereof.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at Detroit, in said district, this third day of November, in the year of our Lord one thousand nine hundred and twenty-one, and of the Independence of the United States of America the one hundred and forty-sixth.

[SEAL.]

ELMER W. VOORHEIS,
Clerk United States District Court,
Eastern District of Michigan.

60 (Indorsement:) In the Supreme Court of the United States. John A. Grogan, collector of internal revenue for the first district of Michigan, and Richard I. Lawson, collector of customs for the first district of Michigan, appellants, vs. Hiram Walker & Sons, Ltd., appellee. Return of clerk of the District Court of the United States for the Eastern District of Michigan to claim of appeal of appellants, in the above-entitled cause.

(Indorsed on cover:) File No. 28570. E. Michigan D. C. U. S. Term No. 615. John A. Grogan, collector of internal revenue for the First District of Michigan, et al., appellants, vs. Hiram Walker & Sons, Ltd. Filed November 9th, 1921. File No. 28570.



TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 639.

**THE ANCHOR LINE (HENDERSON BROTHERS), LTD.,
APPELLANT,**

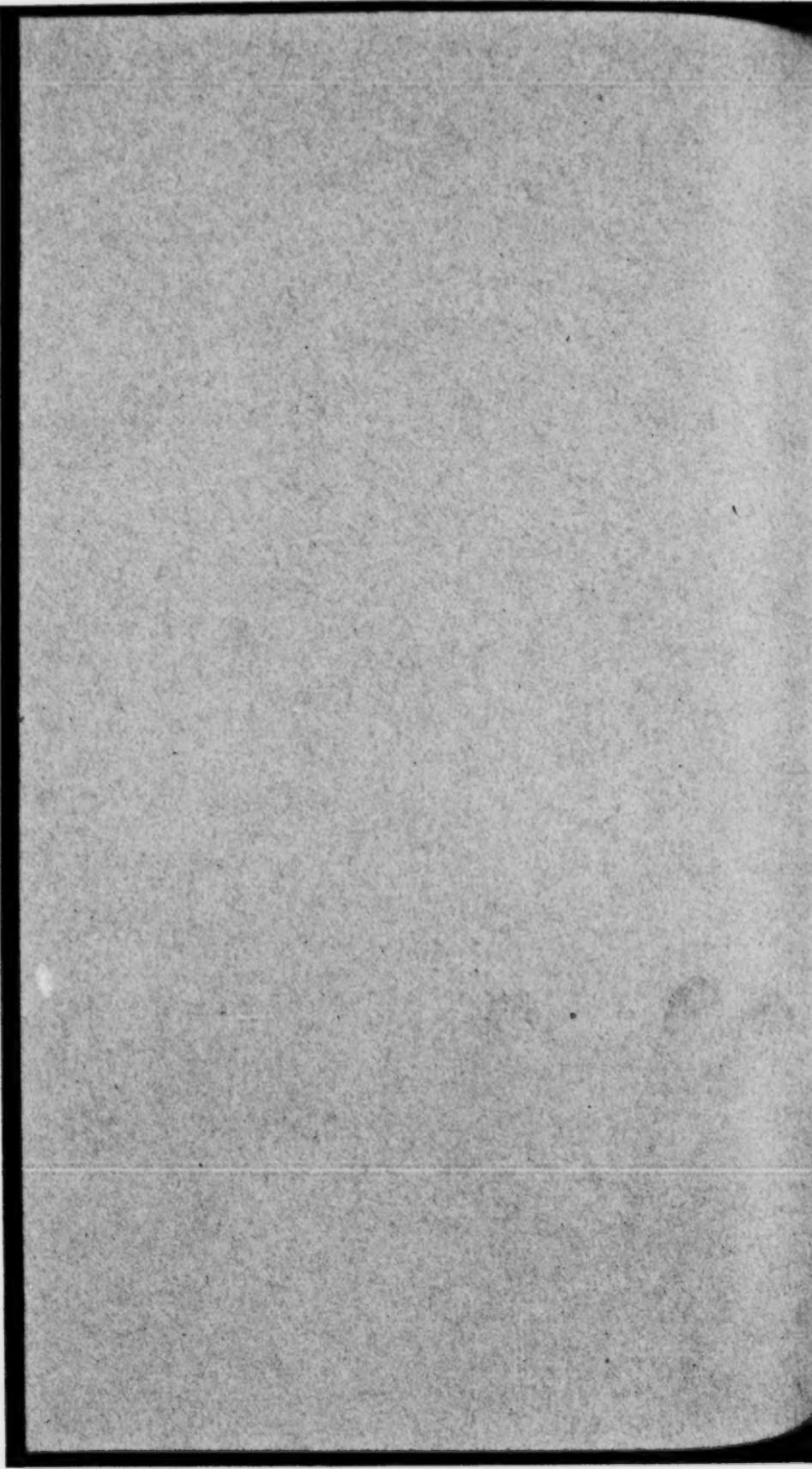
v.s.

**GEORGE W. ALDRIDGE, COLLECTOR OF CUSTOMS FOR
THE PORT OF NEW YORK.**

**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE SOUTHERN DISTRICT OF NEW YORK.**

FILED DECEMBER 9, 1921.

(28,594)



(28,594)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 639.

THE ANCHOR LINE (HENDERSON BROTHERS), LTD.,
APPELLANT,

v.s.

GEORGE W. ALDRIDGE, COLLECTOR OF CUSTOMS FOR
THE PORT OF NEW YORK.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE SOUTHERN DISTRICT OF NEW YORK.

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- 1 The President of the United States of America to George W.
Aldridge, Collector of Customs for the Port of New York,
Greeting:

You are hereby commanded to appear before the Judges of the District Court of the United States of America for the Southern District of New York, in the Second Circuit, to answer a bill of complaint exhibited against you in the said Court in a suit in Equity, by The Anchor Line (Henderson Brothers) Ltd., and to further do and receive what the said Court shall have considered in this behalf; and this you are not to omit under the penalty on you of Two Hundred and Fifty Dollars (\$250).

Witness, Honorable Learned Hand, Judge of the District Court of the United States for the Southern District of New York, at the City of New York, on the 19th day of July in the year One Thousand Nine Hundred and twenty-one, and of the Independence of the United States the One Hundredth and Forty-sixth.

ALEX. GILCHRIST, JR.,
Clerk.

LORD, DAY & LORD,
Plaintiff - Sol'r.

The defendant is required to file his answer or other defense in the above cause in the Clerk's Office of this Court on or before the twentieth day after service hereof excluding the day of said service; otherwise the bill aforesaid may be taken pro confesso.

[SEAL.]

ALEX. GILCHRIST, JR.,
Clerk.

- 3 In the District Court of the United States for the Southern
District of New York.

In Equity.

THE ANCHOR LINE (HENDERSON BROTHERS), LTD., Complainant,
against

GEORGE W. ALDRIDGE, Collector of Customs for the Port of New York, Defendant.

To the Honorable the Judges of the District Court of the United States for the Southern District of New York, Sitting in Equity:

I. Complainant, Anchor Line (Henderson Brothers) Ltd., is a corporation duly organized and existing under the laws of the

United Kingdom of Great Britain and Ireland, with its principal place of business at Glasgow, Scotland. Complainant is informed and verily believes, and therefore alleges, on information and belief,
that the defendant George W. Aldridge is the Collector of
Customs for the Port of New York, and that said defendant is
by law charged with the duty of enforcing the terms and the
provisions of the Acts of Congress and the regulations and decisions
of the Secretary of the Treasury herein below referred to, within that
portion of the Port of New York wherein the complainant desires to
tranship certain wines and intoxicating liquors, as hereinafter set
forth.

II. This is a suit of civil nature, arising under the Constitution, laws and treaties of the United States. The matter in controversy exceeds the sum of Three Thousand Dollars (\$3,000) in value, exclusive of interest and costs.

III. Complainant was incorporated in 1899 under the laws of the United Kingdom of Great Britain and Ireland for the purpose of carrying on a steamship business and since that time has been engaged in the business of transporting, as a common carrier, passengers and cargo for hire on the high seas and, in transacting such business, the complainant maintains and operates a fleet of steamships which sail from ports of the United Kingdom to ports of Europe, Canada and the United States.

All of said steamships are British vessels built and registered in Great Britain and not in the United States and flying the British flag.

Complainant succeeded to the extensive business and the property and good will of, and theretofore used therein by, Handyside & Henderson from the year 1856 until sold by them to Henderson Brothers, who in turn sold said business and property to the complainant in 1899 which has ever since owned, managed, carried on and conducted said business.

Complainant has capital stock of the par value of £575,000, divided into 32,500 five and one half per cent, cumulative preference shares of the par value of £10 each, and 25,000 ordinary shares of the par value of £10 each, all of which stock has been duly issued for value and is now outstanding.

IV. Complainant further alleges as follows:

1. It is the owner of six steamships worth over \$6,000,000 plying regularly and frequently between Glasgow and New York; it leases a pier known as Pier No. 64, North River, New York City.

2. It has during the past three years transported large quantities of wines and intoxicating liquors from Glasgow to the port
6 of New York, where such liquors were transshipped to vessels destined for the West Indies and other countries outside of the jurisdiction of the United States; the quantity of such wines and intoxicating liquors so transported and the amount of revenue

derived from such transportation were as set forth in Exhibit A hereunto attached and reference thereto is prayed.

3. That a substantial part of complainant's revenue is derived from the transportation of wines and intoxicating liquors from Glasgow and other ports in the United Kingdom to the port of New York, not, however, to be landed in New York, but to be transshipped in the port of New York to steamers destined to ports outside the United States and that such business is carried on in competition with other carriers.

V. Section 3005 of the Revised Statutes, as amended, provides as follows:

"All merchandise arriving at any port of the United States destined for any Foreign country, may be entered at the Custom House and conveyed, in transit, through the territory of the United States without the payment of duties, under such regulations as to examination and transportation as the Secretary of the Treasury may prescribe."

VI. For many years prior to and since the adoption of the so-called National Prohibition Act on October 28, 1919, complainant has been permitted to transship at the port of New

7 York liquors shipped from ports outside of the United States, for transshipment in the port of New York to vessels destined for ports outside of the United States after obtaining permits at the Custom House, said permits being issued by the Collector of Customs under the "regulations" prescribed by the Secretary of the Treasury, a copy whereof is hereunto attached and marked Exhibit B, and reference thereto is prayed.

VII. The wines and intoxicating liquors hereinabove referred to were transshipped either by bonded lighter or bonded truck, and no wines and intoxicating liquors were ever lost while being so transferred.

VIII. Under date of July 8th, 1921, the Secretary of the Treasury caused to be transmitted the following telegram to the Collectors of Customs relating to the transshipment of liquor.

"Collector of Customs Juneau, Alaska, New Orleans, La., Nogales, Ariz., New York, N. Y., Buffalo, N. Y., Wilmington, N. C., Chicago, Ill., Cleveland, O., Bridgeport, Conn., Portland, Ore., Pembina, No. Dak., Philadelphia, Pa., Duluth, Minn., San Juan, Porto Rico, El Paso, Tex., Providence, R. I., Tampa, Fla., Rochester, N. Y., Galveston, Tex., Port Arthur, Texas, San Antonio, Tex., San Francisco, Cal., Savannah, Ga., Los Angeles, Cal.,

8 Honolulu, Hawaii, San Diego, Cal., Portland, Me., Charlston, S. C., Baltimore, Md., Ogdensburg, N. Y., Boston, Mass., St. Albans, Vt., Detroit, Mich., Norfolk, Va., St. Paul, Minn., Seattle, Wash., Mobile, Ala.; Milwaukee, Wis., Great Falls, Mont.;

Pursuant Attorney General's opinion June thirtieth affirming previous opinion February fourth you are directed to refuse transportation and exportation entries for all intoxicating liquors your district not covered by prohibition permit. This order is to be effective on all such liquors shipped from foreign countries on and after July fifteenth, nineteen twenty-one. Such liquors shipped on or after that date should be seized and forfeited in usual manner under customs regulations.

(Signed)

J. H. MOYLE."

Complainant is advised by counsel and verily believes that such directions of the Secretary of the Treasury were and are arbitrary, unauthorized and void, because they purport and attempt to limit and restrict the plaintiff's right to have liquor arriving on complainant's vessels at the port of New York, destined to a foreign country, transshipped to ships destined to ports outside of the United States.

IX. The Attorney General, in response to a request for an opinion as to whether the Eighteenth Amendment of the Constitution of the United States and the National Prohibition Act prohibited or affected in any way "in transit" shipments of liquor for 9 beverage purposes touching at the ports of or moving through the United States when originating in and destined for foreign countries under the provisions of Section 3005 of the Revised Statutes, as amended, advised the Secretary of the Treasury that Section 3005 of the Revised Statutes did not apply to intoxicating liquors for beverage purposes and that the National Prohibition act prohibits "in transit" shipments of such liquors touching at the ports of or moving through the United States, though the same originate in and are destined to foreign countries.

X. Complainant is advised by counsel and verily believes that if the interpretation placed upon the National Prohibition Act by the opinion of the Attorney General as aforesaid is correct, it renders the said act unconstitutional and void for the reason that the National Prohibition Act was adopted by the Congress in reliance upon and in the exercise of the powers given the Congress by the Eighteenth Amendment to the Constitution of the United States and that said amendment only authorizes the Congress to regulate the transportation of intoxicating liquors when they are to be used for beverage purposes in the United States and territory subject to the jurisdiction thereof; that the said amendment does not give the Congress power to regulate the transshipment 10 of intoxicating liquors in the ports of the United States when intoxicating liquors are not landed in such ports but are transshipped there as an incident to their transportation to countries outside the United States and hence Section 3005 of the Revised Statutes still permits the transshipment in a port of the United States of shipment of wines and intoxicating liquors originating in and destined to a foreign country.

XI. Complainant is also advised by counsel and verily believes said interpretation placed upon the National Prohibition Act by the opinion of the Attorney General is erroneous and void for the reason that the transshipment in the ports of the United States of shipments of wines and intoxicating liquors originating in and destined to a foreign country is not transportation, or exportation as forbidden by the Eighteenth Amendment to the Constitution of the United States or in the so-called National Prohibition Act because said wines and intoxicating liquors are not to be used for beverage purposes within the United States, and hence Section 3005 of the Revised Statutes still permits the transshipment in a port of the United States of wines and intoxicating liquors originating in and destined to a foreign country.

XII. Complainant is advised by counsel and verily believes that said construction placed upon the National Prohibition Act by the Attorney General is illegal, erroneous and void in that it violates the Treaties between the United States and Great Britain, particularly the treaty dated May 8, 1871, ratified June 17, 1871 and proclaimed July 4, 1871, and particularly Article XXIX thereof, and hence Section 3005 of the Revised Statutes still permits the transshipment in the ports of the United States of shipments of wines and intoxicating liquors originating in and destined to a foreign country.

The material provisions of said article of the Treaty hereinbefore mentioned are as follows:

"It is agreed that, for the term of years mentioned in Article XXXIII, of this treaty, goods, wares, or merchandise arriving at the ports of New York, Boston and Portland and any other ports in the United States which have been or may, from time to time, be specifically designated by the President of the United States and destined for her Britannic Majesty's possessions in North America, may be entered at the proper custom house and conveyed in transit, without the payment of duties through the territory of the United States, under such rules, regulations and conditions for the protection of the revenue as the government of the United States may from time to time prescribe; and under like rules, regulations and conditions, goods, wares or merchandise may be conveyed in transit, without the payment of duties, from such possessions through the territory of the United States for export from the said ports of the United States."

XIII. The complainant has, in the course of its business, contracted with Gilmour, Thompson & Company of Glasgow, Scotland, to transport five cases of whiskey, which is an intoxicating liquor, from Glasgow to Hamilton, Bermuda, to be there delivered to Burrows & Company, agents for Gilmour, Thompson & Company at that place.

Bermuda is a colony and a possession of the Kingdom of Great Britain and Ireland and subject to the jurisdiction and laws of the Kingdom of Great Britain and Ireland.

Said whiskey has been shipped and is being transported on the S. S. "Cameronia," a vessel belonging to complainant and is covered by a bill of lading to said consignees at Hamilton, Bermuda.

Said steamship "Cameronia" sailed from Glasgow, Scotland on July 17, 1921 and is now on the high seas bound for the port of New York.

13 Said liquor is to be transshipped in the port of New York for carriage to Hamilton, Bermuda, from the S. S. "Cameronia" to a steamship belonging to the Quebec Line, a corporation organized and existing under the laws of the Dominion of Canada and maintaining and operating a fleet of steamships. None of said steamships is registered in the United States and all of said steamships fly the British flag.

A bill of lading has also been issued for the carriage of such whiskey on the S. S. "Cameronia" from Glasgow to New York which calls for the delivery of said whiskey to the Quebec Line to be carried to Bermuda.

XIV. None of said whiskey to be so transported is to be used for beverage purposes within the United States or territory under the jurisdiction thereof, and it is to be brought to the port of New York only for the purpose of transshipment there, as aforesaid.

XV. The complainant alleges that defendant, George W. Aldridge, as directed by said telegram of the Secretary of the Treasury, has threatened to seize and forfeit the said whiskey now in transportation on the S. S. "Cameronia," as aforesaid, and has stated he will refuse to issue the permits for transshipment in the port of New York as provided for in the regulations under Section 3005 of the

Revised Statutes heretofore referred to. Complainant verily
14 believes that said defendant, George W. Aldridge, will seize
and forfeit said whiskey and will refuse to issue said permits.

Said George W. Aldridge also threatens to seize any other wine and intoxicating liquors which complainant shall bring into the port of New York for transshipment at the port of New York to foreign ports and has stated that he will not again issue any permits for the transshipment of wines and intoxicating liquors within the port of New York.

XVI. Complainant alleges that if it should be deprived of the right to tranship liquor through the port of New York pursuant to the terms of Section 3005 of the Revised Statutes as amended, or if the terms and provisions of the so-called National Prohibition Act construed by the Secretary of the Treasury should be held to have repealed Section 3005 of the Revised Statutes, a large part of its valuable business and good will would be impaired and depreciated and future profits from such portion thereof would be rendered impossible. The value of its property as a going concern would be diminished to the great and irreparable injury of the complainant and such injury and damage would be incapable of admeasurement

15 and adjudication in an action at law and likewise that if such wines and intoxicating liquors were seized, such seizure and prohibition from shipping through the port of New York

would compel it to cease the transaction of the business of transporting wines and intoxicating liquors between Glasgow and New York for transshipment to British possessions in the West Indies, South America, and other ports outside of the United States, to its irreparable injury.

XVII. Complainant is advised by counsel, and therefore avers, that according to the true intent and meaning of said National Prohibition Act, said Section 3005 of the Revised Statutes was not in any way amended or repealed and that the National Prohibition Act does not apply to shipments of liquor for beverage purposes touching at the ports of the United States when originating in and destined to foreign countries, but that the provisions of Section 3005 of the Revised Statutes are still in full force and effect and that the complainant is entitled to tranship said whiskey at the port of New York. As more fully appears from said telegram of the Secretary of the

Treasury, said Secretary of the Treasury has construed the
16 said Act of Congress as forbidding the transshipment of liquor

originating in and destined for foreign countries and not intended to be used for beverage purposes within the United States. Notwithstanding the fact that such interpretation of the Act of Congress is erroneous, unauthorized and void and that it exceeds the authority conferred upon the Secretary of the Treasury by the provisions of said Act, and notwithstanding the fact that said National Prohibition Act, if it purports to prohibit the transportation of liquor not intended to be used for beverage purposes within the United States, is unconstitutional and void for the reasons hereinabove stated, it is nevertheless the intent and threat of the defendant, George W. Aldridge, his agents and subordinates, acting in pursuance of said unauthorized directions of the Secretary of the Treasury, to seize the whiskey now being transported on S. S. "Cameronia" for transshipment as aforesaid and any other wines and intoxicating liquors brought to the port of New York for transshipment, and to enforce against the complainant, its officers, agents and servants, various pains and penalties including fines and imprisonment, and

various forfeitures of property provided by the Acts of Congress and regulations and thus involve the complainant, its officers, agents and servants, in numerous suits and by such threats to prevent complainant, its employees and servants, from carrying out its contracts to tranship liquor in the port of New York and thus deprive the complainant of its business; all to the irreparable damage of the complainant, and such injury and damage would be incapable of admeasurement and adjudication in an action at law. Furthermore, complainant would be involved in numerous suits if it was forced to bring an action at law to recover back each shipment of liquor so seized. Complainant alleges that in order successfully to carry on its business of transporting liquor for transshipment at the Port of New York, it is necessary and essential for it to make contracts for transportation of wines and liquors and that such contracts for the transportation must be made a long time prior to the commencement of the shipment; that unless the complainant can

immediately procure from this Honorable Court relief in the premises, no such contract for shipment can reasonably or safely be made; that there will be in that event a cessation of the said business
18 for an indefinite and probably considerable time; such cessation of business will involve irreparable damage to it in that it will destroy a considerable part of its business and cause a loss of its profit and tend to the destruction and loss of its trade and custom.

XVIII. For as much, therefore, as complainant is without remedy in the premises, except in a court of equity and to the end that it may obtain from this Honorable Court the relief to which it is entitled, it respectfully prays that the above named defendant, George W. Aldridge, be directed to make full, true and perfect answer to this Bill of Complaint, but not under oath, an answer under oath being hereby expressly waived, and that the said defendant, his agents, servants, subordinates and employes and each and every one of them, be enjoined and restrained from in any manner enforcing or attempting to enforce, or cause to be enforced, against the complainant, its officers, servants and employes, or any of them, any of the pains, penalties or forfeitures, provided in and by the aforesaid Acts of Congress or any laws or regulations of the Secretary of the

Treasury aforesaid, and from arresting and prosecuting the
19 complainant, its officers, agents, servants, or employes, or any of them for or on account of any alleged violation by them or any of them of the terms of the Acts and provisions of the said Act of Congress, on the ground or claim that transshipping liquor transported through the ports of the United States although shipped from and destined to foreign countries, under the provisions of Section 3005 of the Revised Statutes, is contrary to law.

Complainant further prays that the defendant, his agents, servants, subordinates and employees be restrained and enjoined from refusing to issue to the complainant, its agents, officers, servants, employes or any of them the permits under Section 3005 of Revised Statutes heretofore referred to; and that the complainant have such other and further relief as to the court may seem just and equitable in the premises.

Complainant further prays that it be granted a restraining order and preliminary injunction pending the final hearing and decision of this cause whereby the defendant, his agents, servants, subordinates and employees and each and every one of them will be enjoined and restrained as heretofore prayed, and that upon final hearing the said injunction be made perpetual.

20 Complainant further prays that a writ of subpoena be issued
herein directed to said defendant, George W. Aldridge,
commanding him on a day set to appear and answer the
amended bill of complaint herein.

ANCHOR LINE (HENDERSON
BROTHERS), LTD.,
By R. H. BLAKE,
Agent.

LORD, DAY & LORD,
Solicitors for Complainant.

25 Broadway, New York City.

LUCIUS H. BEERS,
FRANKLIN B. LORD,
Of Counsel for Complainant.

21 STATE OF NEW YORK,
County of New York, ss:

On this 18th day of July, 1921 before the undersigned, a Notary
Public, duly commissioned and sworn, appeared R. H. Blake who
being duly sworn deposes and says: That he is an agent of and for
The Anchor Line (Henderson Brothers) Ltd., the complainant in
the above entitled suit; that he has read the foregoing Bill of Com-
plaint and knows the contents thereof and that the same is true
of his own knowledge except as to the matters therein stated upon
information and belief, and as to those matters he believes them to
be true.

R. H. BLAKE.

EMILIO TRIPPITELLI,
Notary Public, Kings County.

Certificate Filed in New York County.

22 EXHIBIT A.

Liquor Transshipments from Glasgow, 1918-1920.

1918.

For British West Indies:

Whiskey	230 cases						
Wine	2 hogsheads						
Stout	40 cases						
Ale	25 cases, 5 barrels—Freight earned.....						162

For Cuba, Mexico, and S. America:

Whiskey	4,956 cases, 285 barrels	
	11 hogsheads	
Stout	275 cases	
Ale	375 cases, 7 barrels	
Beers	3,073 cases	
Wine	29 cases	
Gin	50 cases	
Bitters	10 cases—Freight earned	1,245
		=====
	Total Freight	1,407

1919.

For British West Indies:

Whiskey	81 cases, 4 hogsheads	
Gin	10 cases	
Ale	10 hogsheads—Freight earned	33

For Cuba, Mexico and S. America:

Whiskey	14,928 cases, 430 barrels	
	12 casks, 81 baskets	
Gin	466 cases	
Stout	690 cases	
Beer	435 cases	
Ale	10,948 cases—Freight earned	3,287
		=====
	Total Freight	3,320

23

1920.

For British West Indies:

Beer	105 cases	
Whiskey	18 casks, 35 hogsheads	
	770 cases	
Ale	230 hogsheads, 40 cases	
Wine	10 cases—Freight earned	905

For Cuba, Mexico and S. America:

Whiskey	12,520 cases, 10 hogsheads	
Ale	3,864 cases	
Beer	9,560 cases	
Stout	65 cases	
Wine	627 cases, 5 hogsheads	
Gin	30 cases—Freight earned	4,012
		=====
	Total Freight	4,917

1918	1,407
1919	3,320
1920	4,917
Total freight earned	9,644

EXHIBIT B.

Customs Regulations for Transshipment.

Article 694.

"Entry in Transit for Exportation.—Merchandise arriving at any port in the United States and shown by manifest, bill of lading, invoice or other satisfactory evidence to be destined to a foreign country, may be entered for shipment in transit through the United States or for immediate exportation without examination or appraisement. Invoices will not be required on such entries but entries must contain a proper description of the merchandise and its aggregate value and the marks and numbers on the packages.

Hides not disinfected according to U. S. regulations cannot be shipped in transit through the United States.

The name of the consignee who is to attend to the shipment at the port of exit must be noted on the entry.

Article 695.

Procedure at Port of Original Entry.—

(a) Foreign merchandise arriving by rail.

(b) When foreign merchandise in transit through the United States is transshipped at the port of first arrival for shipment in transit, an entry "in transit for exportation" (Customs Cat. No. 7510) must be filed at the port of entry in quintuplicate, two copies for use at the original port, one for use as a permit and two for use at port of destination. One of the latter will be returned as a cancellation certificate upon the exportation of the merchandise. Merchandise arriving on one vessel, consigned to one party, must be included in one entry in transit for exportation although destined to two or more places in a foreign country.

Upon the completion of the entry the same procedure will be followed as in the case of an entry for immediate transportation without appraisement.

A record of in-transit merchandise entered and forwarded for exportation at another port will be kept at port of first arrival on Customs Cat. No. 5047.

Procedure at Port of Exportation.—

(a) When merchandise is to be transshipped. Upon the arrival of the goods from another port at the port of exportation, the car-

rier will deliver to the collector the carrier's customs manifest (Customs Cat. No. 7512) accompanying the car. The customs seals on the car may be removed under authority from the collector and contents of cars delivered for transfer to exporting vessel upon presentation to the discharging inspector Customs Cat. No. 7513 properly filled out. This form is a combined permit to export bonded goods, transfer ticket and export declaration and will be prepared by the exporting consignee. The carrier will indorse the transfer ticket and the discharging inspector will note the delivery in his return on the carrier's manifest. The transfer ticket (Customs Cat. No. 7513) will accompany the merchandise to the exporting vessel and will be certified to by the lading inspector and delivered to vessel to be attached to the outward manifest prior to clearance.

If any part of a shipment is not exported on the vessel named (the inspector will note it and get new ticket for the goods diverted). There must be at all times in the possession of the inspector on the station at which bonded goods are awaiting exportation, a transfer ticket (Customs Cat. No. 7513) covering such goods. This form will be used in lieu of an export declaration on merchandise shipped under customs bonds and such merchandise must not be exported until this form has been signed by the lading inspector. After the clearance of the exporting vessels, this form will be detached from the outward manifest and forwarded to the Bureau of Customs Statistics at the Port of New York. The fact of exportation will be endorsed on the mail copy of the entry (Customs Cat. No. 7510) which will be returned to the port of first arrival as a cancellation certificate.

27 (b) When merchandise is not transshipped.

(c) If foreign merchandise in transit is brought in at, and exported from the same port, an entry "in transit for exportation" (Customs Cat. No. 7510) will be filed in triplicate, one copy for use as a permit. When merchandise is exported in the importing vessel without landing, the customs officer in charge of the vessel shall certify that the vessel was constantly under customs supervision and that merchandise entered for exportation was not discharged during her stay in port.

28 In the District Court of the United States for the Southern District of New York.

In Equity.

22-52.

THE ANCHOR LINE (HENDERSON BROTHERS), LTD., Complainant,
against

GEORGE W. ALDRIDGE, Collector of Customs for the Port of New York, Defendant.

On reading the annexed bill of complaint, let the defendant herein show cause before this court at a Term thereof for the hearing of motions to be held at the Post Office Building, Borough of Manhattan, City of New York, on the 21st day of July, 1921, at Ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, why an order should not be made restraining the defendant, his agents, servants and subordinates during the pendency of this suit from seizing, disturbing, removing, or in any way interfering with the wines and intoxicating liquors, and any of them, now being transported from Glasgow, Scotland, en complainant's S. S. 29 "Cameronia", more particularly set forth in the bill of complaint herein, and why the complainant should not have such other and further relief as may be just.

Sufficient cause appearing, service of a copy of this order on the defendant on or before the 19th day of July, 1921, shall be sufficient service, and pending the determination of the motion arising on this order to show cause, the defendant, George W. Aldridge, his agents, servants and subordinates are hereby restrained from seizing, disturbing, removing, or in any way interfering with said wines and intoxicating liquors, or any of them.

Dated, New York, July 18th, 1921.

LEARNED HAND,
U. S. District Judge.

30 In the District Court of the United States for the Southern District of New York.

In Equity.

THE ANCHOR LINE (HENDERSON BROTHERS), LTD., Complainant,
against

GEORGE W. ALDRIDGE, Collector of Customs for the Port of New York, Defendant.

To the Honorable the Judges of the District Court of the United States for the Southern District of New York, sitting in equity:

The complainant, Anchor Line (Henderson Brothers) Ltd., a corporation, brings this, its amended bill of complaint, against the above named defendant and respectfully shows unto this Honorable Court as follows:

I. Complainant, Anchor Line (Henderson Brothers) Ltd., is a corporation duly organized and existing under the laws of the United Kingdom of Great Britain and Ireland, with its principal place of business at Glasgow, Scotland. Complainant is informed

and verily believes, and therefore alleges, on information and
31 belief, that the defendant, George W. Aldridge is the Col-

lector of Customs for the Port of New York, and that said defendant is by law charged with the duty of enforcing the terms and the provisions of the Acts of Congress and the regulations and decisions of the Secretary of the Treasury herein below referred to, within that portion of the Port of New York wherein the complainant desires to tranship certain wines and intoxicating liquors, as hereinafter set forth.

II. This is a suit of civil nature, arising under the Constitution, laws and treaties of the United States. The matter in controversy exceeds the sum of Three Thousand Dollars (\$3,000) in value, exclusive of interest and costs.

III. Complainant was incorporated in 1899 under the laws of the United Kingdom of Great Britain and Ireland for the purpose of carrying on a steamship business and since that time has been engaged in the business of transporting, as a common carrier, passengers and cargo for hire on the high seas and, in transacting such business, the complainant maintains and operates a fleet of steamships which sail from ports of the United Kingdom to ports of Europe, Canada and the United States.

All of said steamships are British vessels built and registered in
Great Britain and not in the United States and flying the
32 British flag.

Complainant succeeded to the extensive business and the property and good will of, and theretofore used therein by, Handyside & Henderson from the year 1856 until sold by them to Hender-

son Brothers, who in turn sold said business and property to the complainant in 1899 which has ever since owned, managed, carried on and conducted said business.

Complainant has capital stock of the par value of £575,000, divided into 32,500 five and one half per cent, cumulative preference shares of the par value of £10 each, and 25,000 ordinary shares of the par value of £10 each, all of which stock has been duly issued for value and is now outstanding.

IV. Complainant further alleges as follows:

1. It is the owner of six steamships worth over \$6,000,000 plying regularly and frequently between Glasgow and New York; it leases a pier known as Pier No. 64, North River, New York City.

2. It has during the past three years transported large quantities of wines and intoxicating liquors from Glasgow to the port of New

York, where such liquors were transshipped to vessels destined
33 for the West Indies and other countries outside of the jurisdiction of the United States; the quantity of such wines and intoxicating liquors so transported and the amount of revenue derived from such transportation were as set forth in Exhibit A hereunto attached and reference thereto is prayed.

3. That a substantial part of complainant's revenue is derived from the transportation of wines and intoxicating liquors from Glasgow and other ports in the United Kingdom to the port of New York, not, however, to be landed in New York, but to be transshipped in the port of New York to steamers destined to ports outside the United States and that such business is carried on in competition with other carriers.

V. Section 3005 of the Revised Statutes, as amended, provides as follows:

"All merchandise arriving at any port of the United States destined for any foreign country, may be entered at the custom house and conveyed, in transit, through the territory of the United States without the payment of duties, under such regulations as to examination and transportation as the Secretary of the Treasury may prescribe."

VI. For many years prior to and since the adoption of the so-called National Prohibition Act on October 28, 1919, complainant has been permitted to transship at the port of New York liquors shipped from ports outside of the United States, for transshipment in the port of New York to vessels destined for ports outside
34 of the United States after obtaining permits at the custom house, said permits being issued by the Collector of Customs under the "regulations" prescribed by the Secretary of the Treasury, a copy whereof is hereunto attached and marked Exhibit B, and reference thereto is prayed.

VII. The wines and intoxicating liquors hereinabove referred to were transshipped either by bonded lighter or bonded truck.

VIII. Under date of July 8th, 1921, the Secretary of the Treasury caused to be transmitted the following telegram to the Collectors of Customs relating to the transshipment of liquor.

"Collector of Customs: Juneau, Alaska, Nogales, Ariz., Buffalo, N. Y., Chicago, Ill., Bridgeport, Conn., Pembina, No. Dak., Duluth, Minn., El Paso, Tex., Tampa, Fla., Galveston, Tex., San Antonio, Tex., Savannah, Ga., Honolulu, Hawaii, Portland, Me., Baltimore, Md., Boston, Mass., Detroit, Mich., St. Paul, Minn., Mobile, Ala., New Orleans, La., New York, N. Y., Wilmington, N. C., Cleveland, O., Portland, Ore., Philadelphia, Pa., San Juan, Porto Rico, Providence, R. I., Rochester, N. Y., Port Arthur, Texas, San Francisco, Cal., Los Angeles, Cal., San Diego, Cal., Charleston, S. C., Ogdensburg, N. Y., St. Albans, Vt., Norfolk, Va., Seattle, Wash., Milwaukee, Wis., Great Falls, Mont.;

Pursuant Attorney General's opinion June thirtieth af-
35 firming previous opinion February fourth you are directed
to refuse transportation and exportation entries for all in-
toxicating liquors your district not covered by prohibition permit.
This order is to be effective on all such liquors shipped from foreign
countries on and after July fifteenth, nineteen twenty-one. Such
liquors shipped on or after that date should be seized and forfeited
in usual manner under customs regulations.

J. H. MOYLE."

Complainant is advised by counsel and verily believes that such directions of the Secretary of the Treasury were and are arbitrary, unauthorized and void, because they purport and attempt to limit and restrict the plaintiff's right to have liquor arriving on complainant's vessels at the port of New York, destined to a foreign country, transshipped to ships destined to ports outside of the United States.

IX. The Attorney General, in response to a request for an opinion as to whether the Eighteenth Amendment of the Constitution of the United States and the National Prohibition Act prohibited or affected in any way "in transit" shipments of liquor for beverage purposes touching at the ports of or moving through the United States when originating in and destined for foreign countries under the provisions of Section 3005 of the Revised Statutes, as amended, advised the Secretary of the Treasury that Section 3005 of the Revised

36 Statutes did not apply to intoxicating liquors for beverage purposes and that the National Prohibition Act prohibits "in transit" shipments of such liquors touching at the ports of or moving through the United States, though the same originate in and are destined to foreign countries.

X. Complainant is advised by counsel and verily believes that if the interpretation placed upon the National Prohibition Act by the opinion of the Attorney General as aforesaid is correct, it renders

the said act unconstitutional and void for the reason that the National Prohibition Act was adopted by the Congress in reliance upon and in the exercise of the powers given the Congress by the Eighteenth Amendment to the Constitution of the United States and that said amendment only authorizes the Congress to regulate the transportation of intoxicating liquors when they are to be used for beverage purposes in the United States and territory subject to the jurisdiction thereof; that the said amendment does not give the Congress power to regulate the transshipment of intoxicating liquors in the ports of the United States when intoxicating liquors are not landed in such ports but are transshipped there as an incident to their transportation to countries outside the United States and hence Section 3005 of the Revised Statutes still permits the transshipment in a port of the United States of shipments of wines and intoxicating liquors originating in and destined to a foreign country.

XI. Complainant is also advised by counsel and verily believes said interpretation placed upon the National Prohibition Act by the opinion of the Attorney General is erroneous and void for the reason that the transshipment in the ports of the United States of shipments of wines and intoxicating liquors originating in and destined to a foreign country is not transportation, or exportation as forbidden by the Eighteenth Amendment to the Constitution of the United States or in the so-called National Prohibition Act because said wines and intoxicating liquors are not to be used for beverage purposes within the United States, and hence Section 3005 of the Revised Statutes still permits the transshipment in a port of the United States of wines and intoxicating liquors originating in and destined to a foreign country.

38 XII. Complainant is advised by counsel and verily believes that said construction placed upon the National Prohibition Act by the Attorney General is illegal, erroneous and void in that it violates the Treaties between the United States and Great Britain, particularly the treaty dated May 8, 1871, ratified June 17, 1871 and proclaimed July 4, 1871, and particularly Article XXIX thereof, and hence Section 3005 of the Revised Statutes still permits the transshipment in the ports of the United States of shipments of wines and intoxicating liquors originating in and destined to a foreign country.

The material provisions of said article of the Treaty hereinbefore mentioned are as follows:

"It is agreed that, for the term of years mentioned in Article XXXIII, of this treaty, goods, wares, or merchandise arriving at the ports of New York, Boston and Portland and any other ports in the United States which have been or may, from time to time, be specifically designated by the President of the United States and destined for her Britannic Majesty's possessions in North America, may be entered at the proper custom house and conveyed in transit, 39 without the payment of duties through the territory of the United States, under such rules, regulations and conditions for the protection of the revenue as the government of the United

States may from time to time prescribe; and under like rules, regulations and conditions, goods, wares or merchandise may be conveyed in transit, without the payment of duties, from such possessions through the territory of the United States for export from the said ports of the United States."

XIII. The complainant has, in the course of its business, contracted with Gilmour, Thompson & Company of Glasgow, Scotland, to transport five cases of whiskey, which is an intoxicating liquor, from Glasgow to Hamilton, Bermuda, to be there delivered to Burrows & Company, agents for Gilmour, Thompson & Company at that place.

Bermuda is a colony, and a possession of the Kingdom of Great Britain and Ireland and subject to the jurisdiction and laws of the Kingdom of Great Britain and Ireland.

Said whiskey has been shipped and is being transported on the S. S. "Cameronia," a vessel belonging to complainant and is covered by a bill of lading to said consignees at Hamilton, Bermuda.

Said steamship "Cameronia" sailed from Glasgow, Scotland, on July 17, 1921 and is now on the high seas bound for the port of New York.

40 Said liquor is to be transshipped in the port of New York for carriage to Hamilton, Bermuda, from the S. S. "Cameronia" to a steamship belonging to the Quebec Line, a corporation organized and existing under the laws of the Dominion of Canada and maintaining and operating a fleet of steamships. None of said steamships is registered in the United States and all of said steamships fly the British flag.

A bill of lading has also been issued for the carriage of such whiskey on the S. S. "Cameronia" from Glasgow to New York which calls for the delivery of said whiskey to the Quebec Line to be carried to Bermuda.

XIV. None of said whiskey to be so transported is intended to be used for beverage purposes within the United States or territory under the jurisdiction thereof, and it is to be brought to the port of New York only for the purpose of transshipment there, as aforesaid.

XV. The complainant alleges that defendant, George W. Aldridge, as directed by said telegram of the Secretary of the Treasury, has threatened to seize and forfeit the said whiskey now in transportation on the S. S. "Cameronia," as aforesaid, and has stated he will refuse

41 to issue the permits for transshipment in the port of New York as provided for in the regulations under Section 3005 of the

Revised Statutes heretofore referred to. Complainant verily believes that said defendant, George W. Aldridge, will seize and forfeit said whiskey and will refuse to issue said permits.

Said George W. Aldridge also threatens to seize any other wines and intoxicating liquors which complainant shall bring into the port of New York for transshipment at the port of New York to foreign ports and has stated that he will not again issue any permits for the transshipment of wines and intoxicating liquors within the port of New York.

XVI. Complainant alleges that if it should be deprived of the right to transship liquor through the port of New York pursuant to the terms of Section 3005 of the Revised Statutes as amended, or if the terms and provisions of the so-called National Prohibition Act as construed by the Secretary of the Treasury should be held to have repealed Section 3005 of the Revised Statutes, a large part of its valuable business and good will would be impaired and depreciated and future profits from such portion thereof would be rendered impossible. The value of its property as a going concern 42 would be diminished to the great and irreparable injury of the complainant and such injury and damage would be incapable of admeasurement and adjudication in an action at law and likewise that if such wines and intoxicating liquors were seized, such seizure and prohibition from shipping through the port of New York would compel it to cease the transaction of the business of transporting wines and intoxicating liquors between Glasgow and New York for transshipment to British possessions in the West Indies, South America, and other ports outside of the United States, to its irreparable injury.

XVII. Complainant is advised by counsel, and therefore avers, that according to the true intent and meaning of said National Prohibition Act, said Section 3005 of the Revised Statutes was not in any way amended or repealed and that the National Prohibition Act does not apply to shipments of liquor for beverage purposes touching at the ports of the United States when originating in and destined to foreign countries, but that the provisions of Section 3005 of the Revised Statutes are still in full force and effect and that the complainant is entitled to transship said whiskey at the port of New York. As more fully appears from said telegram of the Seeretary 43 of the Treasury, said Secretary of the Treasury has construed the said Act of Congress as forbidding the transshipment of liquor originating in and destined for foreign countries and not intended to be used for beverage purposes within the United States. Notwithstanding the fact that such interpretation of the Act of Congress is erroneous, unauthorized and void and that it exceeds the authority conferred upon the Secretary of the Treasury by the provisions of said Act, and notwithstanding the fact that said National Prohibition Act, if it purports to prohibit the transportation of liquor not intended to be used for beverage purposes within the United States, is unconstitutional and void for the reasons hereinabove stated, it is nevertheless the intent and threat of the defendant, George W. Aldridge, his agents and subordinates, acting in pursuance of said unauthorized directions of the Secretary of the Treasury, to seize the whiskey now being transported on S. S. "Cameronia" for transshipment as aforesaid and any other wines and intoxicating liquors brought to the port of New York for transshipment, and to enforce against the complainant, its officers, agents and servants, various pains and penalties including fines and imprisonment, and various 44 forfeitures of property provided by the Acts of Congress and regulations and thus involve the complainant, its officers, agents and servants, in numerous suits and by such threats

to prevent complainant, its employees and servants, from carrying out its contracts to transship liquor in the port of New York and thus deprive the complainant of its business; all to the irreparable damage of the complainant, and such injury and damage would be incapable of admeasurement and adjudication in an action at law. Furthermore, complainant would be involved in numerous suits if it was forced to bring an action at law to recover back each shipment of liquor so seized. Complainant alleges that in order successfully to carry on its business of transporting liquor for transshipment at the port of New York, it is necessary and essential for it to make contracts for transportation of wines and liquors and that such contracts for the transportation must be made a long time prior to the commencement of the shipment; that unless the complainant can immediately procure from this Honorable Court relief in the premises, no such contract for shipment can reasonably or safely be made;

that there will be in that event a cessation of the said business
45 for an indefinite and probably considerable time; such cessation of business will involve irreparable damage to it in that it will destroy a considerable part of its business and cause a loss of its profits and tend to the destruction and loss of its trade and custom.

XVIII. For as much, therefore, as complainant is without remedy in the premises, except in a court of equity and to the end that it may obtain from this Honorable Court the relief to which it is entitled, it respectfully prays that the above named defendant, George W. Aldridge, be directed to make full, true and perfect answer to this Bill of Complaint, but not under oath, an answer under oath being hereby expressly waived, and that the said defendant, his agents, servants, subordinates and employes and each and every one of them, be enjoined and restrained from in any manner enforcing or attempting to enforce, or cause to be enforced, against the complainant, its officers, servants and employes, or any of them, any of the pains, penalties or forfeitures, provided in and by the aforesaid Acts of Congress or any laws or regulations of the Secretary of the Treasury aforesaid, and from arresting and prosecuting the complainant, its officers, agents, servants, or employes, or any 46 of them, for or on account of any alleged violation by them or any of them of the terms of the Acts and provisions of the said Act of Congress, on the ground or claim that transshipping liquor transported through the ports of the United States although shipped from and destined to foreign countries, under the provisions of Section 3005 of the Revised Statutes, is contrary to law.

Complainant further prays that the defendant, his agents, servants, subordinates and employees be restrained and enjoined from refusing to issue to the complainant, its agents, officers, servants, employees or any of them the permits under Section 3005 of Revised Statutes heretofore referred to; and that the complainant have such other and further relief as to the court may seem just and equitable in the premises.

Complainant further prays that it be granted a restraining order and preliminary injunction pending the final hearing and decision

of this cause whereby the defendant, his agents, servants, subordinates and employees and each and every one of them will be enjoined and restrained as heretofore prayed, and that upon final hearing the said injunction be made perpetual.

Complainant further prays that a writ of subpoena be issued herein directed to said defendant, George W. Aldridge, commanding him on a day set to appear and answer the amended bill of complaint herein.

ANCHOR LINE (HENDERSON
BROTHERS), LTD.,
By R. H. BLAKE,
Agent.

LORD, DAY & LORD,
Solicitors for Complainant.

25 Broadway, New York City.

LUCIUS H. BEERS,
FRANKLIN B. LORD,
Of Counsel for Complainant.

48 STATE OF NEW YORK,
County of New York, ss:

On this 30th day of August, 1921, before the undersigned, a Notary Public, duly commissioned and sworn, appeared R. H. Blake, who being duly sworn, deposes and says: That he is an agent of and for The Anchor Line (Henderson Brothers) Ltd., the complainant in the above entitled suit; that he has read the foregoing Bill of Complaint and knows the contents thereof and that the same is true of his own knowledge except as to the matters therein stated upon information and belief, and as to those matters he believes them to be true.

R. H. BLAKE.

[SEAL.] FREDERICK W. EGGERS,
Notary Public.

Bronx Co. Clerk's No. 22.
N. Y. Co. Clerk's No. 147.
N. Y. Register's No. 3123.
Comm. Expires Mar. 30, 1923.

49

EXHIBIT A.

Liquor Transshipments from Glasgow, 1918-1920.

1918.

For British West Indies:

Whiskey	230 cases
Wine	2 hogsheads
Stout	40 cases
Ale	25 cases, 5 barrels—Freight earned = . . . £162

For Cuba, Mexico and S. America:

Whiskey	4,956 cases, 285 barrels, 11 hogsheads	
Stout	275 cases	
Ale	375 cases, 7 barrels	
Beer	3,073 cases	
Wine	29 cases	
Gin	50 cases	
Bitters	10 cases—Freight earned =	1,245
Total freight		£1,407

1919.

For British West Indies:

Whiskey	81 cases, 4 hogsheads	
Gin	10 cases	
Ale	10 hogsheads—Freight earned =	£33

For Cuba, Mexico and S. America:

Whiskey	14,928 cases, 430 barrels, 12 casks, 81 baskets	
Gin	466 cases	
Stout	690 cases	
Beer	435 cases	
Ale	10,948 cases—Freight earned =	£3,287
Total freight		£3,320

50

1920.

For British West Indies:

Beer	105 cases	
Whiskey	18 casks, 35 hogsheads, 770 cases	
Ale	230 hogsheads, 40 cases	
Wine	10 cases—Freight earned =	£905

For Cuba, Mexico and S. America:

Whiskey	12,520 cases, 10 hogsheads	
Ale	3,864 cases	
Beer	9,560 cases	
Stout	65 cases	
Wine	627 cases, 5 hogsheads	
Gin	30 cases—Freight earned =	4,012
Total freight		£4,917
1918		£1,407
1919		3,320
1920		4,917
Total freight earned		£9,644

EXHIBIT B.

Customs Regulations for Transshipment.

Article 694.

"Entry in Transit for Exportation.—Merchandise arriving at any port in the United States and shown by manifest, bill of lading, invoice or other satisfactory evidence to be destined to a foreign country, may be entered for shipment in transit through the United States or for immediate exportation without examination or appraisement. Invoices will not be required on such entries but entries must contain a proper description of the merchandise and its aggregate value and the marks and numbers on the packages.

Hides not disinfected according to U. S. regulations cannot be shipped in transit through the United States.

The name of the consignee who is to attend to the shipment at the port of exit must be noted on the entry.

Article 695.

Procedure at Port of Original Entry.—

(a) Foreign merchandise arriving by rail.

(b) When foreign merchandise in transit through the United States is transshipped at the port of first arrival for shipment in transit, an entry "in transit for exportation" (Customs Cat. No. 7510) must be filed at the port of entry in quintuplicate, 52 two copies for use at the original port, one for use as a permit and two for use at port of destination. One of the latter will be returned as a cancellation certificate upon the exportation of the merchandise. Merchandise arriving in one vessel, consigned to one party, must be included in one entry in transit for exportation although destined to two or more places in a foreign country.

Upon the completion of the entry the same procedure will be followed as in the case of an entry for immediate transportation without appraisement.

A record of in-transit merchandise entered and forwarded for exportation at another port will be kept at port of first arrival on Customs Cat. No. 5047.

Procedure at Port of Exportation.—

(a) When Merchandise is to be Transshipped.—Upon the arrival of the goods from another port at the port of exportation, the carrier will deliver to the collector the carrier's customs manifest (Customs Cat. No. 7512) accompanying the car. The customs seals on the car may be removed under authority from the collector and contents of cars delivered for transfer to exporting vessel upon presentation to the discharging inspector Customs Cat. No. 7513

properly filled out. This form is a combined permit to export bonded goods, transfer ticket and export declaration and will be prepared by the exporting consignee. The carrier will endorse the transfer ticket and the discharging inspector will note the delivery in his return on the carrier's manifest. The transfer ticket (Customs Cat. No. 7513) will accompany the merchandise to the exporting vessel and will be certified to by the lading inspector and delivered to vessel to be attached to the outward manifest prior to clearance.

If any part of a shipment is not exported on the vessel named (the inspector will note it and get new ticket for the goods diverted). There must be at all times in the possession of the inspector on the station at which bonded goods are awaiting exportation, a transfer ticket (Customs Cat. No. 7513) covering such goods. This form will be used in lieu of an export declaration on merchandise shipped under customs bonds and such merchandise must not be exported until this form has been signed by the lading inspector. After the clearance of the exporting vessel, this form will be detached from the outward manifest and forwarded to the Bureau of Customs Statistics at the Port of New York. The fact of exportation will be endorsed on the mail copy of the entry (Customs Cat. No. 7510) which will be returned to the port of first arrival as a cancellation certificate.

54 (b) When merchandise is not transshipped.

(c) If foreign merchandise in transit is brought in at, and exported from the same port, an entry "in transit for exportation" (Customs Cat. No. 7510) will be filed in triplicate, one copy for use as a permit. When merchandise is exported in the importing vessel without landing, the customs officer in charge of the vessel shall certify that the vessel was constantly under customs supervision and that merchandise entered for exportation was not discharged during her stay in port.

55

Answer.

District Court of the United States, Southern District of New York

THE ANCHOR LINE (HENDERSON BROTHERS), LTD., Complainant
against

GEORGE W. ALDRIDGE, Collector of Customs for the Port of New York
Defendant.

Now comes the defendant herein and in answer to the amended bill of complaint by his attorney, William Hayward, United States Attorney for the Southern District of New York, alleges as follows:

First. Defendant moves that the amended bill of complaint herein and divers parts thereof be dismissed, and assigns the following grounds for this motion, namely:

1. The suit is in effect one against the United States and the bill does not aver or show that the United States has consented to be sued herein.
2. The Court has no jurisdiction to grant the relief prayed for or any part thereof.
3. The bill does not present a cause of action in equity
56 under the Constitution of the United States.
4. The bill does not disclose a cause of action equitable in its nature, civil in its character and arising under the Constitution of the United States.
5. The facts alleged in the bill are insufficient to constitute a valid cause of action in equity.
6. It appears from the bill that the complainant has a plain, adequate and complete remedy at law.

Second. Defendant denies that the directions of the Secretary of the Treasury set forth in Paragraph VII of the amended bill are arbitrary, unauthorized or void, and on the contrary alleges that the said directions are valid and that it was incumbent upon the Secretary of the Treasury to issue such directions under the law.

Third. Defendant denies each and every allegation contained in Paragraphs X and XI of said amended bill.

Fourth. Defendant denies the allegations in Paragraph XII of said amended bill that the construction placed upon the National Prohibition Act by the Attorney General is illegal, erroneous and void in that it violates the treaties between the United States and Great Britain, particularly the treaty dated May 8, 1871, ratified

57 June 17, 1871 and proclaimed July 4, 1871, and more particularly Article XXIX thereof, and that hence Section 3005

of the Revised Statutes still permits the transshipment in the ports of the United States of shipments of wines and intoxicating liquors, originating in and destined to a foreign country. On the contrary, defendant alleges that said article of said treaty has long since been abrogated by operation of law and does not apply to the kind of merchandise here in question.

Fifth. Defendant denies the allegations contained in Paragraph XVII of said amended bill of complaint in so far as it is alleged that according to the true intent and meaning of said National Prohibition Act, said Section 3005 of the Revised Statutes was not in any way amended or repealed and that the National Prohibition Act does not apply to shipments of liquor for beverage purposes touching at the ports of the United States when originating in and destined to foreign countries, and the allegation in said Paragraph XVII that the provisions of Section 3005 of the Revised Statutes are still in full force and effect and that the complainant is entitled to tranship said whiskey at the Port of New York. Defendant further

denies those allegations of Paragraph XVII of said amended
58 bill which allege that the interpretation placed upon the
National Prohibition Act by the Secretary of the Treasury
is erroneous, unauthorized and void and that it exceeds the authority
conferred upon the Secretary of the Treasury by the provisions of
said Act, and that the National Prohibition Act, if it purports to pro-
hibit the transportation of liquor not intended to be used for bever-
age purposes within the United States, is unconstitutional and void.

For a separate and distinct defense herein, defendant alleges:

Sixth. Defendant realleges and reaffirms as part of this separate
and distinct defense each and every allegation contained in para-
graphs First to Fifth above.

Seventh. On information and belief that for the past three years
intoxicating liquors originating in foreign countries, have been
landed in the Port of New York under in transit bills of lading,
that is, bills of lading which show that the shipments were destined
to consignees in foreign countries, and that such shipments have
been transferred within the Port of New York from importing vessels
to exporting vessels and from points of rail deliveries to exporting
vessels. That the amount of this traffic has been large and
59 may be divided generally into two classes. These two classes
are:

(a) Shipments from European countries destined to points in
Central America, South America and the West Indies, which are
transshipped in the Port of New York to the exporting vessel.

(b) Shipments by rail from Canada, mainly of whiskey and aleo-
hol, consigned to persons in countries of South or Central America
or the West Indies. These shipments from Canada arrive by rail
and are upon bills of lading calling either for delivery alongside the
exporting vessel in New York or for delivery to an intermediate
consignee at a rail point of delivery.

Eighth. On information and belief that in all cases of such liquors
arriving by vessel, the responsibility of the importing vessel appears
to cease forty-eight hours after the landing of the shipment or upon
the actual delivery to a Government truckman or lighterman. That
such intoxicating liquors are frequently to be exported by a vessel
berthed at a different dock and schedule to sail sometimes as much
as twelve days after the landing of the importing vessel, and that in
some cases the dock from which the exporting vessels sail is as much
as six or seven miles by land or water from the berth of the
60 incoming vessel, as for instance where shipments arriving
on the Anchor Line at Pier 64 North River, at West 23rd
Street, New York City, are destined to be exported by a vessel sailing
from the piers of the Bush Terminal in South Brooklyn, N. Y.
That in all cases there elapses some time, of perhaps a day or more,
and there is involved some carriage by land or water or both, and
that such lapse of time and necessity of carriage in this port has sub-

jected such liquors to pilferage, loss and other unlawful disposition, with the result that large quantities of such liquor enter into consumption for beverage purposes in the United States.

Ninth. On information and belief that with respect to the shipments from Canada by rail, the same situation exists, particularly with respect to shipments which are consigned to an intermediate consignee at a point of rail delivery.

Tenth. On information and belief that both in the cases of importation by vessel and in those of importation by rail, there have been and were up to July 15, 1921, large losses of such intoxicating liquors destined for foreign countries, and deponent verily believes

that such liquors were purloined or stolen and ultimately
61 found their way into consumption for beverage purposes, in
the United States, contrary to the statute. That annexed
hereto and made a part hereof as Exhibit "A" is a schedule made up
on information furnished by the Collector of Customs at the Port of
New York and which defendant believes to be true and correct showing
instances between July 1, 1919, and July 1, 1921, in which shortages
of liquor were discovered by the customs officials upon the arrival
of the said shipments upon the exporting vessels, such shortages having
occurred between the time the goods were landed in the Port
of New York and the time of their arrival upon the exporting vessel,
all said instances being cases in which the importing carrier
was a vessel belonging to and operated by the complainant herein.
That attached hereto and made a part hereof as Exhibit "B" is a
schedule showing instances where shortages of intoxicating liquors
have been discovered by the customs officials upon the arrival of
such liquors upon the exporting vessel, all such shortages having occurred
in the Port of New York except where noted as "en route".
The instances noted in said Schedule "B" are made up from information
furnished by the Collector of the Port of New York and defendant
believes said schedule to be true and correct. The instances
so mentioned are cases in which the importing carrier
62 was some company other than the complainant herein.

Eleventh. That as evidence of the limits to which the purloiners of such intoxicating liquors will go to obtain said liquors unlawfully, defendant alleges on information and belief the facts in Entry No. 17413, appearing on "Exhibit B" attached hereto and made a part hereof. In that case a shipment of 500 drums of high proof alcohol was landed from the steamship "Mexico" of the Ward Line at Pier 13, East River, on December 17, 1920. This shipment was thereafter loaded on two barges, the "George E" and the "Cornell", for transfer to a vessel of the American Mediterranean Levant Line at the foot of 10th Street, South Brooklyn, which was scheduled to sail for Constantinople about January 3, 1921. The barge "Cornell" containing 282 drums of the shipment was moored in the neighborhood of Pier 1, North River, and was stolen during the night of December 22-23, 1920, and was not recovered until several days after. That upon recovery of the barge there were found to be miss-

ing 174 drums of 190-proof Cuban alcohol, and that there have been recovered since that time only 29 drums of such alcohol, so that there are still missing 145 drums of alcohol, which deponent believes has entered into consumption in the United States.
63 That such drums each contained 108 or 109 gallons of high proof alcohol and that the liquidated tax on the alcohol lost is shown by Customs liquidation to be \$147,694.67. That defendant is informed and believes and therefore alleges that the purloining of this alcohol was accomplished by previous theft of a tug moored on the New Jersey shore of the Hudson River, which tug was navigated to the berth of the two lighters above named, at Pier 1, North River; that the said tub was attached to the lighter containing the larger share of the shipment in question which was moored on the outside of the two lighters; that these drums of alcohol weighed approximately 900 pounds apiece; and that defendant verily believes that thorough plans were worked out for having the lighter unprotected and for unloading it and delivering the drums to unknown persons.

Twelfth. On information and belief that prior to July 1921 the practice of the Collector of the Port of New York in cases where such liquor was found to be missing on exportation was to endeavor to collect from the truckman or other carrier \$2.60 per gallon under Paragraph 237 of the Tariff Act plus \$6.40 per gallon under Paragraph 600 of the Revenue Act of 1918. That on July 7, 1921 pursuant to request for instructions by the Collector of Customs 64 at New York, the Secretary of the Treasury issued the following ruling:

Office of the Secretary,

Washington.

4675/297.

July 7, 1921.

The Collector of Customs,
New York, N. Y.

SIR:

The Department refers to your letter of 20th ultimo, relative to the practice of basing fines against carriers and truckmen for shortages in bonded shipments of distilled spirits upon the highest rate of duty and internal revenue tax accruing, that is, at the rate of \$2.60 per gallon under paragraph 237 of the Tariff Act, plus \$6.40 per gallon under paragraph 600 of the Revenue Act of 1918.

You state that at the present time the highest assessment made upon regular importations is \$2.60 per gallon under the Tariff Act, and \$2.20 under the Revenue Act, and ask to be advised if, in the Department's opinion, it is proper in cases of the kind under consideration to base the fine upon a total of \$4.80 per proof gallon.

The tax imposed on distilled liquors under Section 600 of the Revenue Act of 1918, is for liquors imported for beverage purposes. Liquor coming into the country after the Prohibition Act cannot lawfully be imported for beverage purposes and, therefore, it would

65 seem that a subsequent shortage accruing while in the custody of the carrier would not serve to revive the above section.

Also the duty accrues on the merchandise at the time of entry and the carrier contracts to protect the Government from loss of duty while in its custody. As the duty and tax which accrues were not assessed on the basis of the importation for beverage purposes, the revenue loss to the Government of any shortage cannot be any greater than the rate assessed for the importation at time of entry. The Government cannot lose an amount equal the highest rate assessed under Section 600 as no importation can be made for beverage purposes.

Therefore, it is the opinion of the Department, that the total of \$4.80 per proof gallon is the proper amount upon which to base fines against carriers and truckmen for shortages in shipments of distilled liquors.

Respectfully,

GEO. W. ASHWORTH,
Chief Div. of Customs.

Thirteenth. That defendant is informed by his attorney and therefore alleges that if the complainant is correct in his construction of the National Prohibition Act, the implications involved are exceedingly serious and a claim of the complainant, if allowed, would carry with it as a necessary corollary the right of any foreigner or foreign ship to transport liquor within the territorial waters of the United States provided the intention of the shipper was not to import the same into the United States. Defendant is further informed and believes and therefore alleges that for the past six months at least a

large and profitable business has been carried on by American citizens with the object and result of importing liquor into this country contrary to the law. That the vessels used by such persons are vessels under British registry and such vessels sail out of a British port in the Bahama Islands furnished with clearance papers showing that they are bound for Halifax, another British port. Defendant is further informed and believes that one such vessel is now under seizure in the Port of New York and that another such vessel came into the Port of Philadelphia, having previously unladen part of its cargo of liquor. That said vessel in Philadelphia, though actually engaged in smuggling, alleges that part of its cargo was unladen and that it came into the Port of Philadelphia by reason of stress of weather and that it was in fact bound from one British port to another. Defendant is further informed and believes and therefore alleges that such vessels carrying proper clearances and manifests from one British port to another showing in their papers no intention of landing the liquor in the United States for transhipment or otherwise could, if complainant is correct in its contentions, navigate without let or hindrance the territorial waters of the United States and could then enter ports of the United States for repairs or supplies without interference by the officials of the Government. Defendant is further informed and believes and therefore alleges that if, as complainant claims the

so-called National Prohibition Act does not prohibit the transportation of liquor within the territorial waters of the United States and that vessels originating at a foreign port bound to a foreign port are entitled to navigate the territorial waters of the United States without interference by the officials of the United States Government where they are liquor laden, that the task of preventing the smuggling of liquor into the United States by means of such foreign vessels, which task is already difficult, will be rendered practically impossible.

Fourteenth. That attached hereto and made a part hereof as Exhibits "C," "D" and "E" respectively are the forms of bond now and for some time past in use as prescribed by the Secretary of the Treasury to be furnished by cartmen or lightermen, by the exporter and by the common carrier of merchandise transported under Section 3005 of the Revised Statutes of the United States.

Wherefore, defendant prays that the bill of complaint herein be dismissed and that the defendant have such other and further relief as to the court may seem just and the defendant recover his

68 costs and disbursements herein.

WILLIAM HAYWARD,
*United States Attorney for the
Southern District of New York,
Solicitor for the Defendant.*

Office and Post Office Address: Old Post Office Building, Borough of Manhattan, City of New York.

EXHIBIT A.

*Shipments Arriving on Vessels of the Anchor Line in Which There
Were Shortages Discovered on Export, with Amount of Importa-
tion and of Shortage.*

Entry.	Date.	Amount imported.	Shortage.
22631.	September 2, 1919..	236 cases beer & whiskey	25 cases.
23220.	September 16, 1919.	595 cases whiskey	12 "
26252.	November 11, 1919.	1,466 cases ale, etc.	1 case.
26211.	November 11, 1919.	242 packages whiskey, etc.	1 "
26257.	November 11, 1919.	231 cases whiskey	13 cases.
26263.	November 11, 1919.	25 cases whiskey	1 case.
26963.	November 24, 1919.	13 baskets & 100 cases whiskey	2 bask'ts & 4.68 gls.
28943.	December 30, 1919.	300 cases whiskey	79 cases.
28948.	December 30, 1919.	165 cases whiskey & gin	90 "
28952.	December 30, 1919.	50 cases whiskey	48 "
28955.	December 30, 1919.	35 cases whiskey	20 "
28956.	December 30, 1919.	35 cases gin & whiskey	12 "
35490.	April 26, 1920.....	400 cases whiskey	13 bottles.
36649.	May 18, 1920.....	763 cases whiskey, etc.	25 bottles.
36654.	May 18, 1920.....	1,170 cases whiskey	12 bottles.
37265.	May 28, 1920.....	1,505 cases whiskey, etc.	5 cases.
70			
10042.	October 5, 1920....	20 cases whiskey	16 bottles.
13707.	November 10, 1920.	450 cases whiskey	5 bottles.
25569.	March 21, 1921....	50 cases whiskey	5 cases.

EXHIBIT B.

Shipments of Intoxicating Liquors Imported between July 1, 1919, and July 1, 1921, by Rail or Ship, by Carriers Other than Complainant in Which Shortages Were Discovered upon Delivery to Exporting Carrier, with Amount of Shipment and of Shortage.

Entry.	Date.	Amount imported.	Shortage.	Importing carrier.
20321.	July 3, 1919.....	200 cases vermouth	7 bottles	Cosulich Line
20323.	July 3, 1919.....	3 cases wine	3 cases	Transatlantic Italiana
22108.	August 22, 1919.....	195 cases liquors, etc.	4½ cases	French Line
1139.	August 5, 1919.....	200 cases whiskey	3 bottles (en route)	N. Y. Central
1274.	September 2, 1919.....	40 cases whiskey	1 case (en route)	"
1286.	September 2, 1919.....	50 cases whiskey	2 cases (en route)	"
1288.	September 2, 1919.....	50 cases whiskey	1 case (en route)	"
1423.	September 7, 1919.....	220 cases whiskey	1 case	Italian Line
23389.	September 17, 1919.....	50 cases vermouth	1.5 bottles	White Star Line
23396.	September 17, 1919.....	100 cases whiskey	1 case	N. Y. Central
1542.	September 12, 1919.....	300 cases whiskey	3 bottles	Holland-American Line
25241.	October 22, 1919.....	222 cases gin & liquor	1 case	"
72				French Line
24284.	October 3, 1919.....	297 cases whiskey, etc.	8 bottles whiskey	Co. Frane de Navig.
25174.	October 21, 1919.....	50 cases wine	1 case	Jiminez & Co.
25283.	October 22, 1919.....	200 cases wine	3 cases	"
25858.	October 29, 1919.....	25 cases wine	6 cases	"
25860.	October 29, 1919.....	99 cases wine	1 case	"
25862.	October 29, 1919.....	55 cases wine	1 case	"
25867.	October 29, 1919.....	25 cases wine	1 case	"
25195.	October 21, 1919.....	832 cases wines, etc.	2 cases vermouth	Co. Frane de Navig.

			N. Y. Central
22732. October 4 th , 1919.	34 cases whiskey	2 cases	
2384. October 8, 1919.	1,241 cases whiskey	9 cases (en route)	"
2247. October 6, 1919.	1,000 cases whiskey	1 case, 5 bottles	"
26404. November 14, 1919.	295 cases wine, etc..	13 22 bottles	Jiminez & Co.
26357. November 12, 1919.	25 cases vermouth	10 cases	Franc de Navigation
25832. November 5, 1919.	372 cases brandy	52 bottles	French Line
28630. November 23, 1919.	100 cases whiskey	7 cases	White Star Line
26630. November 18, 1919.	622 cases wine & brandy	1 case brandy	Furness Line
73			
25859. November 1, 1919.	25 cases wine	3 cases	Jiminez & Co.
26258. November 12, 1919.	75 cases ale	2 cases	Furness
3301. November 22, 1919.	20 cases whiskey	15 bottles	N. Y. Central
3284. November 22, 1919.	20 cases whiskey	1 case (en route)	"
3281. November 22, 1919.	100 cases whiskey	22 cases (en route)	"
3278. November 22, 1919.	8 cases whiskey	2 cases (en route)	"
3019. November 10, 1919.	20 cases whiskey	17 cases	"
3016. November 10, 1919.	50 cases whiskey	5 cases	"
3027. November 10, 1919.	3 cases whiskey	3 cases	"
3021. November 10, 1919.	25 cases whiskey	19 cases	"
3025. November 10, 1919.	101 cases whiskey	100 cases	"
3018. November 10, 1919.	10 cases whiskey	10 cases	"
3020. November 10, 1919.	300 cases whiskey	192 cases	"
3017. November 10, 1919.	50 cases whiskey	32 cases (en route)	"
74			
3023. November 10, 1919.	110 cases whiskey	92 cases	N. Y. Central
3024. November 10, 1919.	30 cases whiskey	18 cases	"

Exhibit B.—Continued.

Entry.	Date.	Amount imported.	Shortage.	Importing carrier.
3808.	December 4, 1919.	200 cases whiskey	16 cases	N. Y. Central
3807.	December 4, 1919.	1,000 cases whiskey	18 cases	"
4422.	December 23, 1919.	600 cases whiskey	8 cases	N. Y. & Cuba M S/S Co.
27420.	December 3, 1919.	338 cases wine	2 cases	Cunard Line
27948.	December 10, 1919.	291 cases gin, etc.	2 cases ale	French Lime
27324.	December 19, 1919.	1,150 cases wine, etc.	7 cases wine 1 case liquor	American Line
27470.	December 3, 1919.	30 cases gin & brandy	3 bottles brandy	French Line
28085.	December 12, 1919.	493 cases champagne	4 bottles	Jiminez & Co.
27740.	December 5, 1919.	145 cases wine	1 case	Co. Transatlantica
27783.	December 8, 1919.	81 cases wine	1 case	French Line
27303.	December 2, 1919.	322 cases liquors, etc.	9 cases liquors	
75				
27837.	December 8, 1919.	100 cases beer	3 bottles whiskey	White Star Line
27739.	December 5, 1919.	25 cases whiskey	25 bottles	Jiminez & Co.
27713.	December 6, 1919.	125 cases wine	1 case wine	French Line
		171 cases champagne		
		etc.		
28011.	December 10, 1919.	351 packages wine	5 cases & 18 bottles	Jiminez & Co.
28010.	December 10, 1919.	29 cases wine	15 bottles	"
27587.	December 4, 1919.	8 cases wine	1 case	Co. Franco de Navig.
29021.	December 31, 1919.	200 cases champagne	2 bottles	Red Star Line
29503.	January 8, 1920.	200 cases cordials	8 bottles	French Line
29729.	January 12, 1920.	25 cases wine	1 case & 9 bottles	Jiminez & Co.
30496.	January 29, 1920.	8 cases rum	1 bottle	United Fruit Co.

29655. January 10, 1920.....	300 cases vermouth	1 case	French Line
30455. January 28, 1920.....	.905 cases gin, etc.	7.5 bottles gin, 1 case wine	Cunard Line
30497. January 29, 1920.....	99 cases rum	8 bottles	United Fruit Co.
30498. January 29, 1920.....	100 cases rum	1 case	French Line
30281. January 23, 1920.....	84 cases spirits	9 cases	Atlantic Transport
76			
30495. January 29, 1920.....	50 cases rum	3.5 bottles rum	United Fruit Co.
30603. January 30, 1920.....	8 cases brandy	1 1/2 cases	French Line
31864. February 24, 1920.....	26 cases brandy	3-1/10 gallons brandy	Cosnich Line
31948. February 25, 1920.....	120 cases vermouth	16 bottles	Navig. Italiana
31362. February 16, 1920.....	140 cases wine and vermouth	1 case & 89 bottles	Transatlantic Italiana
30776. February 3, 1920.....	24 cases wine	1 case & 1 bottle wine	Society National Navigation (Italian)
	1 case liquor	3 cases	Society Navigation
31950. February 25, 1920.....	102 cases vermouth	3 cases	Italian
32307. February 16, 1920.....	131 cases champagne	8 bottles	French Line
31985. February 23, 1920.....	695 cases gin, etc.	6 cases	Atlantic Transport
31257. February 13, 1920.....	100 cases vermouth	56 bottles	Navig. Generale Italia- jana
31895. February 24, 1920.....	116 cases spirits, etc.	1 case wine	American Line
5644. February 9, 1920.....	30 cases whiskey	4 cases spirits 6 bottles	Lehigh Valley
77			
33302. March 19, 1920.....	15 cases vermouth	5 cases, 17 bottles	African Mediterranean Line

EXHIBIT B.—Continued.

Entry.	Date.	Amount imported.	Shortage.	Importing carrier.
32308.	March 2, 1920.	481 cases brandy, etc.	15-7/12 cases	French Line
32738.	March 8, 1920	318 cases liquors	15 bottles cognac	Ward Line
6181.	March 10, 1920	50 cases whiskey	1 bottle	N. Y. Central
33363.	March 24, 1920	253 cases wine	7-3/4 cases	Co. Navig. Italiana
6185.	March 10, 1920	37 cases whiskey	3 bottles	N. Y. Central
33632.	March 24, 1920	1,203 cases wine	46 bottles	Italian Line
6191.	March 10, 1920	500 cases whiskey	3 cases, 9 bots.	N. Y. Central
3823.	March 14, 1920	200 cases whiskey	1 case	N. Y. Central
6186.	March 10, 1920	40 cases whiskey	3 bottles (en route)	"
6187.	March 10, 1920	50 cases whiskey	5 bottles (en route)	"
6182.	March 10, 1920	270 cases whiskey	1 case (en route)	"
6180.	March 10, 1920	100 cases whiskey	1 case (en route)	"
			4 barrels	"
1078.	March 16, 1920	110 cases beer	24 cases (en route)	"
1103.	March 20, 1920	150 barrels beer	7 barrels (en route)	"
78				
1068.	March 15, 1920	110 barrels beer	15 barrels (18 gallons) per bbl.	N. Y. Central
35009.	April 15, 1920	183 barrels wine & vermouth	78 gallons wine	France de Navigation
35013.	April 15, 1920	130 cases brandy, etc.	1 case wine	Co France de Navig.
35010.	April 15, 1920	130 cases brandy & wine	4 cases wine	"
34901.	April 14, 1920	323 cases wine, etc.	4 cases wine	White Star Line
34468.	April 5, 1920	100 cases cognac	34 bottles	Furness Prince

366679. April 29, 1920.	1 hogshead wine	1 hogshead (60 gallons)	Atlantic Transportation Co.
35752. May 1, 1920.	8 cases cognac	6 cases	Furness Prince American Line
36437. May 13, 1920.	30 cases champagne	8 bottles	"
36796. May 19, 1920.	40 cases champagne	6 bottles	Worms & Co.
39021. June 28, 1920.	100 cases liquors, etc.	12 bottles	Ward Line
39017. June 28, 1920.	1,567 cases spirits, etc.	6 bottles spirits	Trans-Atlantic Italiana
37611. June 1, 1920. etc.	1,002 cases liquors, etc.	14 bottles	Cunard Line
38352. June 15, 1920.	552 cases brandy	50 bottles	
37723. June 2, 1920.	50 cases gin	18 bottles	Cunard Line
37563. June 2, 1920.	177 cases gin	11 cases	Ward Line
7171. June 10, 1920.	230 cases whiskey	42 gallons 4 barrels	N. Y. Central
1325. June 29, 1920.	105 barrels beer	131 bottles (en route)	"
7174. June 10, 1920.	30 cases whiskey	72 bottles	"
7176. June 10, 1920.	50 cases whiskey	7 cases	"
7408. June 28, 1920.	300 cases whiskey	300 cases	"
7177. June 10, 1920.	50 cases whiskey	3 cases	"
7160. June 10, 1920.	15 cases whiskey	4 cases	"
7164. June 10, 1920.	100 cases whiskey	4 cases	"
393. July 24, 1920.	300 cases whiskey	3 cases 8 bottles	"
92. July 8, 1920.	800 cases whiskey	2 cases	"
106. July 9, 1920.	140 cases whiskey	2 cases 254 bottles	"
107. July 9, 1920.	55 cases whiskey	55 cases whiskey	"
1520. July 15, 1920.	25 cases gin	41 bottles	Luckenbach
79			
1516. July 15, 1920.	40 cases brandy & gin	6 bottles	"

EXHIBIT B.—*Continued.*

Entry.	Date.	Amount imported.	Shortage.	Importing carrier.
2810.	July 28, 1920.	500 cases whiskey	7 bottles	Purmess
230.	July 13, 1920.	50 barrels beer	20 barrels (en route)	N. Y. Central
6030.	August 28, 1920.	350 cases vermouth	19 bottles	Italiana
3525.	August 1, 1920.	135 cases wine	24 bottles	Cunard Line
4401.	August 12, 1920.	50 cases gin	37 bottles	Luckenbach Line
211.	August 11, 1920.	46 drums alcohol	33 bottles	Delaware, Lackawanna & Western
		5 drums spirits	5 drums	Erie R. R.
982.	August 29, 1920.	218 barrels beer	1 barrel	N. Y. Central
190.	August 20, 1920.	25 barrels beer	137 bottles (en route)	French Line
7569.	September 14, 1920.	40 packages wine, etc.	18 bottles wine	"
7570.	September 14, 1920.	286 packages liquors, etc.	2 cases & 21 bottles	Luckenbach Line
7559.	September 14, 1920.	75 cases champagne	9 bottles	White Star Line
277.	September 20, 1920.	185 barrels beer	1 barrel	N. Y. Central
275.	September 20, 1920.	150 barrels beer	353 bottles	"
9748.	October 1, 1920.	35 cases wine & gin	9 bottles wine	"
81.				
12109.	October 25, 1920.	199 cases wine, etc.	51 bottles wine	Atlantic Transport Co.
9839.	October 2, 1920.	96 cases whiskey	4 bottles	White Star Line
11267.	October 18, 1920.	97 cases vermouth	58 bottles	Atlantic Transport Co.
3285.	October 9, 1920.	20 cases whiskey	6 bottles	N. Y. Central
477.	October 18, 1920.	150 barrels beer	310 bottles	N. Y. Central
2133.	October 16, 1920.	200 cases whiskey	1 case	"
2134.	October 16, 1920.	10 cases whiskey	1 case	"

2137	October 10, 1920	100 cases whiskey	1 ease
1616	October 8, 1920	213 barrels beer	3 cases
2133	October 16, 1920	200 cases whiskey	70 bottles
2133a	October 16, 1920	200 cases whiskey	2 cases
14260	November 15, 1920	200 cases whiskey	2 cases
15778	November 30, 1920	198 cases wine	2 cases
13976	November 12, 1920	25 cases wine	17 bottles
		43.5 cases whiskey, etc.	10 bottles
			23 bottles
2104	December 11, 1920	100 cases whiskey	1 ease
17413	December 20, 1920	500 drums alcohol	145 drums
2394	December 26, 1920	171 barrels beer	105 bottles
4045	January 14, 1921	120 cases whiskey	2 cases 10 bottles
5493	March 28, 1921	982 cases whiskey	70 bottles
24984	March 15, 1921	140 cases wine	10 bottles
25701	March 22, 1921	21 cases liquors	2 bottles
24150	March 7, 1921	360 cases gin	27 bottles
28575	April 21, 1921	25 cases vermont!	18 bottles
30331	May 12, 1921	2,974 cases spirits	19 cases 8 bottles
31682	May 27, 1921	1 cases rum	2 bottles
29822	May 5, 1921	10 cases rum	17 bottles
29823	May 5, 1921	9 cases rum	8 bottles
33120	June 13, 1921	500 cases whiskey	22 bottles

Delaware, Lackawanna
& Western
Ward Line
N. Y. Central
" " "
Society Ital. de Navig.
Ward Line
Atlantic Transport Co.

EXHIBIT C.

Treasury Department.

Customs Cat. No. 3855.
 Art. 826, C. R. 1915.
 C. D. Mar. 14-17.

Bond No. —.

Bond of Customs Cartman or Lighterman.

Know all men by these presents, That — — —, of — — —, as principal, and — — —, of — — —, and — — —, of — — —, as sureties, are held and firmly bound unto the United States of America in the sum of — Dollars, for the payment of which we bind ourselves, our heirs, executors, administrators, successors, and assigns, jointly and severally, firmly by these presents. Witness our hands and seals this — day of —, 191—.

Whereas, the said — — — has made application to be appointed one of the Custom house — within and for the Port of — — —.

Now, therefore, the condition of this obligation is such, That if the said — — —, shall safely deliver all merchandise intrusted to — whether free or dutiable, and shall well and truly perform the several duties of a Customhouse — according to the regulations prescribed

by the Secretary of the Treasury relative to the lighterage, 84 cartage, and drayage of merchandise in bond, and also the

rules and regulations prescribed by the Collector of Customs for the said port in relation thereto, and shall make good all losses or damage which may occur in the — of any goods, wares, or merchandise by the said principal, and in the case of the loss or non-delivery of free goods shall pay an amount equal to the value thereof but not to exceed \$25 in any one case, then this obligation shall be void; otherwise it shall remain in full force and effect.

_____. [SEAL.]
 _____. [SEAL.]
 _____. [SEAL.]

Signed and sealed in the presence of —

_____.
 _____.

(On Reverse of Form.)

STATE OF — — —,
 County of — — —, ss:

Rev. Stats. of the U. S., §2616.

I, — — —, having been appointed — — —, do solemnly* — that I will diligently and faithfully execute the duties of the said office and that I will use the best of my endeavors to prevent and detect

*Swear or affirm.

frands against the laws of the United States imposing duties upon imports.

85. And I do further solemnly* — that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter: so help me God.

—and subscribed before me this — day of —, A. D. 191—.

Deputy Collector.

86 EXHIBIT D.

Treasury Department.

Customs Cat. No. 7557.

C. D., Mar. 26-17.

No. —.

Bond for Exportation or Transportation or for Transportation and Exportation (Single Entry).

(Not required for merchandise withdrawn from warehouse, except when merchandise is transferred to and shipped by a party other than principal on Warehousing Bond.)

Know all men by these presents, That — —, of —, as principal, and — —, of —, and — —, of — as sureties, are held and firmly bound unto the United States of America in the sum of — dollars for the payment of which we bind ourselves, our heirs, executors, administrators, successors, and assigns, jointly and severally, firmly by these presents.

Witness our hand and seals this — day of —, 19—.

Whereas, certain articles described in entry for (W. H. and T. Withd. for Trans., Drawback, etc.) No. —, and filed with the ⁸⁷ Collector of Customs of the port of —, on —, 19—, is intended for exportation or for transportation to — via —.

Now, therefore, the condition of this obligation is such, That if the above-bounden principal shall properly and lawfully enter or withdraw for bona fide exportation or for transportation, or for transportation and exportation, and shall actually export or transport said articles to the destination named herein, and shall furnish the said Collector of Customs with proof that the said articles, if entered

for exportation, were exported through a customs port of exit under customs supervision and landed beyond the limits of the United States, or, if entered or withdrawn for transportation to another customs port, were delivered to the Collector of Customs at the port of destination and there properly entered and rewarehoused, the said proof to be filed in the form and within the time required by law and regulations, or any lawful extension thereof, and if the said principal shall deliver to the Collector of Customs such invoices, certificates, declarations, or other documents that are required by law or regulations in connection with the entry or shipment of said articles and in the form and within the time required by law or regulations,

88 or any lawful extension thereof.

Then this obligation shall be void; otherwise it shall remain in full force and effect.

[SEAL]

[SEAL]

[SEAL]

Signed, Sealed, and Delivered in the presence of—

_____.

1. The names of the parties executing the bond, and their respective places of residence, must appear in full in the body of the bond.
2. Each signature must be made in the presence of two persons who must sign their names as witnesses.
3. There must be not less than two individual sureties; but one corporate surety duly qualified under the act of Congress of August 13, 1894, as amended by the act of March 23, 1910, may be accepted as sole surety. Married women will not be accepted as sureties.
4. If the bond is given by persons composing a firm or partnership it may be executed by any member of such firm or partnership, in which event it will have the same force and effect as if the other members of the firm or partnership had personally executed the same (act of June 20, 1876, as amended by section 70 of the act of August 28, 1894). The names of all persons composing the firm must appear in the body of the bond, as for example, "A, B, and C, composing the firm of A, B & Co." The corporate seal must be affixed to the bond adjoining the signature, as in the case of a private seal affixed by an individual.
5. All erasures and interlineations must be noted above the signatures of the witnesses as having been made before execution of the bond.

89

(On Reverse of Form.)

Surety's Oath.

I, ——, residing at No. —— Street, in ——, State of ——, a surety on the within Bond, do solemnly — that I am a citizen of the United States, and that I am worth the sum of — dollars over and above all debts, claims, and liabilities of every nature whatsoever, and aside from property exempt by law from execution.

(Description of property.)

United States Customs Service,
Collection District No. ——,
Port of ——.

Subscribed and sworn to before me this — day of — 19—.

Deputy Collector of Customs or Notary Public.

90

Surety's Oath.

I, ——, residing at No. —— Street, in ——, State of ——, a surety on the within Bond, do solemnly — that I am a citizen of the United States, and that I am worth the sum of — dollars over and above all debts, claims, and liabilities of every nature whatsoever, and aside from property exempt by law from execution.

(Description of property.)

United States Customs Service,
Collection District No. ——,
Port of ——.

Subscribed and sworn to before me this — day of — 19—.

Deputy Collector of Customs or Notary Public.

EXHIBIT E

Treasury Department

Customs Form No. 3587

Carrier's Bond for Transportation of Merchandise in Customs Custody and for the Lading and Unlading of Merchandise under the Act of February 13, 1911, and Other Acts.

The following rules must be complied with:

1. The names of the parties executing the bond and their respective places of residence must appear in full in the body of the bond.
2. The bond must be executed in duplicate, and it must be dated.
3. Each signature must be made in the presence of two persons who must sign their names as witnesses.
4. There must be not less than two individual sureties, but one corporate surety duly qualified under the act of Congress of August 13, 1894, may be accepted as sole surety.
5. Seals of wax or wafer must be attached to the signatures of principal and sureties, if individuals, and corporate seals must be affixed to the signatures of corporations.
6. A married woman will not be accepted as surety.
7. The sureties must justify in amounts the aggregate of which will be equal to at least twice the penalty of the bond. This rule applies to corporate as well as to individual sureties.
8. Each surety must make and subscribe an affidavit of the amount he is worth over and above all his debts and liabilities, and such exemptions as may be allowed by law, and in addition thereto each individual surety will be required to make affidavit before the collector or deputy collector of the port, or before an officer authorized to administer oaths generally, setting forth by general description the location of one or more pieces of real estate owned by him and the value thereof over and above all encumbrances, and describing the property, real or personal, owned by him (stating the value thereof), which, according to such valuation shall be equal in value to the amount which he has sworn that he is worth in the surety's oath.
9. Where bonds with individual sureties are given, the collector will be required to certify that the bond has been duly executed in duplicate by the obligors therein named; that he knows the sureties whose names are affixed thereto; that he has made careful and diligent inquiry into their pecuniary responsibility, and that they are, in his opinion, responsible for the payment of an amount equal

to double the penalty named in the bond. This certificate is not required in the case of corporate sureties.

10. If the bond is given by an incorporated company, the person executing it in its behalf must be duly authorized by such company to make, execute, and deliver such bond and to affix the corporate seal of such company thereto. A properly authenticated extract from the minutes of the meeting of the board of directors (or other board competent to bind the corporation) showing that the person executing the bond on behalf of such corporation is duly authorized, and also a duly authenticated extract from the minutes showing the election to office of the person or persons who execute the bond on behalf of the company must be attached to or accompany each copy of the bond, and the corporate seal should be affixed to the bond immediately adjoining the signature of the person so executing the same, as in the case of a private seal affixed by an individual.

11. If the bond is given by persons composing a firm or partnership, each member of the firm must execute it personally; but if any member of a firm be unable to personally execute the bond, it may be executed in his behalf by an attorney in fact, duly authorized by power of attorney under seal, which power, or a certified copy thereof, must accompany the bond. The names of all persons composing the firm must appear in the body of the bond, as for example, "A, B, and C, composing the firm of A, B, and Co."

93 12. All erasures and interlineations must be noted above the signatures of the witnesses as having been made before execution of the bond.

Know all men by these presents, that we, ———, as principal, and ———, as surety, are held and firmly bound unto the United States of America in the sum of one hundred thousand dollars, for the payment of which we bind ourselves, our heirs, executors, administrators, successors, and assigns, jointly and severally, firmly by these presents.

Witness our hands and seals this — day of —, 192—.

Whereas the above-bounden principal has been designated as a common carrier for the transportation of merchandise in bond:

Now, therefore, the condition of this obligation is such that if the above-bounden principal shall faithfully observe and comply with the laws of the United States and regulations of the Treasury Department pertaining to the transportation, safe delivery, and

94 lading or unlading of goods, wares, and merchandise, and baggage, under sections 3000, 3001, 3005, and 3006 of the

Revised Statutes, the act of June 10, 1880, the provisions of the act approved February 13, 1911, and any other act or acts relating thereto in effect on the dates of lading, transportation, unlading, and delivery, and under such regulations as may have been or may hereafter be promulgated by the secretary of the Treasury, and shall pay the necessary expense of such locks, seals, and other fastenings as may be prescribed and required by the Secretary of the Treasury for securing the custody and safe transportation of

such merchandise in such cars, vessels, vehicles, safes, trunks, or pouches as may be authorized and used by it for that purpose; and shall also pay the expense of such customs employees as the Secretary of the Treasury, at his discretion, may cause to be stationed at points along the route of such carrier, or upon any car, vessel, or other vehicle (such expense to include the salary as well as the actual necessary traveling expenses of such employees) in such manner as may be directed by the Secretary of the treasury; and shall pay the extra compensation provided for by the said act of February 13, 1911, or any other act or acts in effect at the time of such service, and the regulations issued in pursuance thereof, to be paid to customs employees in connection with the lading or un-

lading of bonded merchandise at night or on Sundays and
95 holidays; and shall use only such means of conveyance for

transportation as may be authorized by the Secretary of the Treasury; and shall, without delay, transport and make prompt report by delivery of the manifest which shall accompany the merchandise and make safe delivery of all goods, wares, and merchandise and baggage, as described in each and every entry or manifest, and in each receipt therefor executed by said principal or its agent, delivered to said principal for transportation under the provisions of the aforesaid laws, or any of them, to the collector or other proper officer of the customs to whom the merchandise is consigned in the manifest, in the manner required by law and regulations aforesaid or in default of such transportation, report, and delivery, shall pay to the United States as liquidated damages an amount equal to the value of the nondutiable merchandise not so transported, reported and delivered, the damages on any one shipment not to exceed \$25; and shall pay an amount equal to the duties on dutiable merchandise not so transported, reported, and delivered, provided that when delivery shall have been made of any bonded merchandise to the ultimate consignee or owner, without permit or release having been issued by the collector or other proper officer of the customs, shall

96 pay in each case in addition to the amounts above specified a sum equal to 25 per cent of the said duties; and shall pay

any Internal Revenue taxes or other taxes accruing to the United States on the merchandise, together with all costs, charges, and expenses caused by the failure to make such transportation, report, and delivery, and shall also protect and save harmless the United States from any and all losses and liabilities which may occur or be occasioned by reason of the granting of a special license to lade and unload bonded merchandise at night or on Sundays and holidays, and also from any loss or damage resulting from fraud or negligence on the part of any officer, agent, or other person employed by the above-bounden principal, then this obligation to be null and void; otherwise to remain in full force and virtue.

Signed, sealed, and delivered in presence of—

The rate of premium on this bond is \$— per thousand; the total amount of premium charged is \$—.

97 *Affidavit of Individual Surety.*

STATE OF ——,
 County of ——, ss:

I, —— ——, being duly sworn, depose and say that I am one of the sureties on the bond of —— —— as —; that I am a resident of —, by occupation a —, doing business at —; that I am worth the sum of — dollars over and above my debts and liabilities owing and incurred, exclusive of property exempt from execution; that I own personal property worth \$—, consisting of¹ — and real estate worth \$—, as follows:² ——.

Sworn to and subscribed before me this — day of —, 192—.

98 *Affidavit of Individual Surety.*

STATE OF ——,
 County of ——, ss:

I, —— ——, being duly sworn, depose and say that I am one of the sureties on the bond of —— ——, as —; that I am a resident of —, by occupation a —, doing business at —; that I am worth the sum of — dollars over and above my debts and liabilities owing and incurred, exclusive of property exempt from execution; that I own personal property worth \$—, consisting of¹ — and real estate worth \$—, as follows:² ——.

Sworn to and subscribed before me this — day of —, 192—.

⁽¹⁾ Here describe the property by name, so that it can be identified—as "Fifteen shares of the stock of the Manhattan Gaslight Company of New York City."

⁽²⁾ Here describe the property by giving the number of the lot and square, or the precise location, if in the city, or by metes and bounds if in the country, that it may be identified.

99

Port of ——, —— —, 192-

I hereby certify that the within bond has been duly executed in duplicate by the obligors therein named; that I have carefully and diligently inquired into the pecuniary responsibility of the sureties thereto; and that the same are, in my opinion, responsible and sufficient to insure the payment of the full amount of the penalty of said bond.

Collector,

100

(On Back of Preceding Carrier's Bond.)

Section of Surety Bonds.

— — —, 192-

Examined and approved as to the within Corporate surety.

Chief Section of Surety Bonds.

Department of Justice,

Office of the Solicitor of the Treasury.

— — —, 192-

Examined and approved as to form and execution.

Assistant Solicitor.

Treasury Department.

— — —, 192-

Approved:

Assistant Secretary.

101 No. —. Bond of —— —— as common carrier of merchandise in bond and for lading and unloading under the act of February 13, 1911.

Treasury Department.

— — —, 192-

Respectfully referred to the Solicitor of the Treasury, through the section of surety bonds, for examination as to form and execution.

Assistant Chief, Division of Customs.

102 At a Stated Term of the District Court of the United States for the Southern District of New York Held in the Court Rooms Thereof, at the Postoffice Building, in the Borough of Manhattan, City of New York, on the 25th Day of July, 1921.

Present: Hon. Learned Hand, District Judge.

THE ANCHOR LINE (HENDERSON BROTHERS), LTD., Complainant,
against

GEORGE W. ALDRIDGE, Collector of Customs for the Port of New York, Defendant.

This cause came on to be heard at a term of this Court for motions held at the Postoffice Building in the Southern District of New York on the 21st day of July, 1921, and an adjournment having been asked by counsel for the defendant, and thereupon upon consideration thereof, it was

Ordered, adjudged and decreed as follows, viz: That the hearing of the said motion be, and the same hereby is, adjourned to the 4th day of August, 1921, at the same time and place, and it is further

Ordered, adjudged and decreed, that the United States Marshal in and for the Southern District of New York be, and he hereby is, directed on the arrival of the Steamship "Cameronia," belonging to the complainant herein, to take into his custody for safe keeping, the five cases of whiskey consigned by Gilmour, Thompson & Company of Glasgow, Scotland, to Burrows & Company, Hamilton, Bermuda, as described in the bill of complaint herein, to hold the same pending the determination of this motion.

LEARNED HAND,
District Judge.

I hereby consent to the entry of the foregoing order and waive notice of settlement thereof.

Dated, July 22, 1921,

WM. HAYWARD,
United States Attorney.

In the District Court of the United States for the Southern District of New York.

THE ANCHOR LINE (HENDERSON BROTHERS), LTD., Complainant,
against

GEORGE W. ALDRIDGE, Collector of Customs for the Port of New York, Defendant.

Please take notice that upon the amended complaint herein and the answer to the said amended complaint a motion will be made at a term for Motions to be held in and for the Southern District of New York at the Post Office Building on the first day of September, 1921 at ten o'clock in the forenoon of that day or as soon thereafter as counsel may be heard for a decree on the pleadings in favor of the

complainant herein and for such other and further relief as to the court may seem just and proper.

LORD, DAY & LORD,
Solicitors for Complainant,

25 Broadway, New York City.

To William Hayward, United States Attorney, Post Office Building, New York City.

105 United States District Court, Southern District of New York.

THE ANCHOR LINE (HENDERSON BROTHERS), LTD., Plaintiff,
against

GEORGE W. ALDRIDGE, Collector of Customs for the Port of New York, Defendant.

Lord, Day & Lord, (Lucius H. Beers and Franklin B. Lord, of counsel), all of New York City, solicitors for the plaintiff, for the motion.

William Hayward, United States Attorney and John Kelley Clark, Jr., Assistant United States Attorney, opposed.

MAYER, *Circuit Judge:*

This is a motion by plaintiff on the bill of complaint and answer for a decree according the relief demanded in the complaint.

The essential facts set forth in the bill and answer are not disputed and may be briefly stated as follows: Plaintiff, a British corporation, contracted with Gilmour, Thompson & Company, of 106 Glasgow, Scotland, to transport five cases of whiskey from Glasgow to Hamilton, Bermuda, there to be delivered to Burrows & Company, agents of Gilmour, Thompson & Company. These cases were shipped on plaintiff's S. S. "Cameronia" which sailed from Glasgow, July 17, 1921, and arrived at the Port of New York on July 27th.

These cases were to be transshipped in the Port of New York from the "Cameronia" to a vessel of another British corporation, the Quebec Line, running from New York to Bermuda. Both the plaintiff's vessels and the vessels of the Quebec Line are British steamships of British registry and flying the British flag, and Bermuda is a British possession.

The cases are covered by a through B/L from Glasgow to Burrows & Company in Bermuda. A B/L also accompanies the shipment to New York calling for the delivery of the cases at the Port of New York to the Quebec Line.

The defendant threatened to seize these cases under instructions received from the Treasury Department dated July 8, 1921, which advised him to refuse transportation and exportation entries for all intoxicating liquors not covered by a prohibition permit. A prohibition permit is issued for liquor to be used for other than beverage

purposes. These instructions stated that this direction was
107 given pursuant to an opinion of the Attorney General.

The opinion thus referred to is one issued under date of February 4, 1921, and affirmed after a rehearing on June 30th, 1921.

That opinion in effect advised that Section 3005 of the Revised Statutes, which relates to the transshipment of merchandise in bond, does not now apply to intoxicating liquors for beverage purposes and that the National Prohibition Act prohibits "in transit" shipments of such liquors touching at the ports of, or moving through, the United States, though the same originate in and are destined to foreign countries.

By order of this Court, the marshal took possession of these five cases on arrival of the "Cameronia" and holds them pending the decision of this motion.

The plaintiff for many years as a part of its business has carried liquors from Glasgow to the Port of New York, where such liquors have been transshipped to destinations in the British possessions in North America and to foreign ports in the Gulf of Mexico and South America.

This carriage of liquors by plaintiff, to be transshipped in New York, has yielded a large revenue to the plaintiff and has continued since the adoption of the National Prohibition Act.

If this carriage is now prevented by the stoppage of these
108 "in transit" shipments, liquor, it is claimed, will be sent from

Great Britain to the British West Indies and South American countries by other routes and plaintiff will suffer a severe loss, for which plaintiff alleges it has no adequate remedy at law. It is also claimed that if such shipments should continue to be made for transshipment in the Port of New York, there will be seizures here which will involve a multiplicity of suits.

Plaintiff contends that the Attorney General was in error in the conclusion arrived at in the opinion of February 4, 1921, and that the Secretary of the Treasury exceeded his authority in directing the defendant to stop transshipments of liquor. Plaintiff accordingly presents the shipment of these five cases from Glasgow to Bermuda as a test case and brings this suit to enjoin the defendant from stopping transshipments of this character.

The answer contains some allegations which are argumentative in character, but no question of fact is raised as to the essential features of the controversy.

Passing by any question as to whether plaintiff has sought the proper remedy and assuming for the purposes of this opinion that it has so done, it is desirable to settle as promptly as possible the
109 fundamental questions of the case. Such disposition, when

ultimately had, will define the rights of the plaintiff and others similarly situated and the rights of the Government.

The Eighteenth Amendment provides as follows:

"Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the

United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

Section 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation."

It will be noted that not only is transportation prohibited, but exportation as well. In other words, in order to carry out this change in national policy, the exportation of liquor for beverage purposes was prohibited, even though a citizen of the United States or a person resident in the United States possessed liquor lawfully prior to the time when the constitutional amendment became effective.

The Congress enacted the National Prohibition Act in accordance with the power conferred by the Constitutional Amendment. Section 3 of Title II of said Act provides:

"Section 3. No person shall on or after the date when the eighteenth amendment to the Constitution of the United States goes into effect, manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor except as authorized in this Act, and all the provisions of this Act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented.

110 Liquor for nonbeverage purposes and wine for sacramental purposes may be manufactured, purchased, sold, bartered, transported, imported, exported, delivered, furnished and possessed, but only as herein provided, and the commissioner may, upon application, issue permits therefor: * * *

There is no provision in the National Prohibition Act which authorizes the transportation here desired in order that the transshipment sought may be accomplished.

If, therefore, "transport" is taken in its literal and ordinary sense, then the transportation which plaintiff would find necessary for its purposes is absolutely prohibited by the Act. It is said, however, and correctly that the principle of Holy Trinity against U. S. 143 U. S. 457 should be here applied and that the Court should look beyond the literal definition of "transport" or "transportation" to ascertain the true meaning of these terms in the light of the legislative intent.

Considering and resorting only to the Act, itself, there is nowhere any indication that the Congress intended to except this kind of transportation from the prohibition of Section 3. The Act does permit the transportation of intoxicating liquor for purposes and under safeguards in the Act set forth and, necessarily, in order to follow the mandate of the Constitution, such transportation or other dealing with intoxicating liquor must be for nonbeverage purposes.

111 The Congress had plenary power to prohibit the transportation of liquor for beverage purposes even though the liquor was destined for some place outside of the United States or territory subject to the jurisdiction thereof. It has the right to set up barriers and safeguards against the wrongful or improper diversion of intox-

eating liquors and it is well known in legislation that a statute will not only define offenses and prescribe the punishment therefor, but will also endeavor to surround the business or traffic dealt with in the statute with safeguards calculated to prevent offenses. It is, therefore, no answer to the provision as to prohibition of transportation to say that it must be presumed that the intended transportation would be lawfully carried out and that, therefore, the Congress did not intend to prohibit a transaction which, if carried to its orderly conclusion, could not have resulted in the use of intoxicating liquors in the United States for beverage purposes. The Act provides a method by which intoxicating liquor intended for non-beverage use may be, *inter alia*, transported and the fact that transshipment of the character here concerned is not within any of the permit provisions of the statute illustrates the point that the Congress desired to safeguard against the illegal use of liquor, destined to a foreign

port, but needing transshipment within the United States,
112 by not allowing it to be transported within the United States; and this, even though it be assumed, as it may be, that the foreign shipper intended that no part of the liquor should remain or be used in the United States for beverage purposes.

The Act in line with the constitutional amendment forbids exportation for beverage purposes. The purpose of the constitutional amendment and of the Act thus forbidding exportation was to destroy the traffic in liquor for beverage purposes and this to prevent manufacture, sale or transportation in the United States, even though by exporting such liquor it would be used for beverage purposes outside of the United States and the territory subject to the jurisdiction thereof.

The doctrine of practical construction of a constitutional provision by legislative enactments is familiar and useful. An interesting illustration of this principle in respect of the New York State Constitution will be found in *People ex rel. Einsfeld v. Murray*, 149 N. Y. 367 at page 376.

The National Prohibition Act has thus practically construed the constitutional provision as to transportation and, in any event, has not authorized the kind of transportation here desired.¹¹³ It may be within the power of the Congress to permit such transportation as was necessary to tranship this liquor to a vessel destined for a foreign port, just as it permitted transportation of intoxicating liquors under various circumstances and for various purposes mentioned in the Act. If the Congress had this power, it declined to exercise it and, on the contrary, in simple and clear language indicated that transportation of intoxicating liquor was prohibited for any and every purpose, "except as authorized in this Act" and, to repeat, the transportation here involved is not within the statutory exception.

It is quite true, as pointed out by the learned counsel for plaintiff, that the words "transportation" and "transport" must be construed in respect of the subject matter which is being dealt with, as illustrated in *Street against Lincoln Safe Deposit Company*, U. S. Supreme Court, November 8, 1920. The Court in that case, said:

"That transportation of the liquors to the home of appellant, under the admitted circumstances, is not such as is prohibited by the section is too apparent to justify detailed consideration of the many provisions of the Act inconsistent with a construction which would render such removal unlawful * * *" (Italics mine.)

It is urged, however, by parity of reasoning, that United States v. Gudger, 249 U. S. 373 is warrant for the proposition that the Congress did not intend by the National Prohibition Act to stop trans-
shipments of this character. The so-called Reed amendment
111 to the Act of March 3, 1917 (39 Stat. 1058-1069) reads as follows:

"Whoever shall order, purchase, or cause intoxicating liquors to be transported in interstate commerce, except for scientific, sacramental, medicinal, and mechanical purposes, into any State or Territory the laws of which State or Territory prohibit the manufacture or sale therein of intoxicating liquors for beverage purposes shall be punished as aforesaid: Provided, That nothing herein shall authorize the shipment of liquor into any State contrary to the laws of such State."

This case might be likened to one where a foreign vessel stops at an American port and then proceeds to a foreign port without, however, transshipping the liquor destined for a foreign port.

If, for instance, in the Gudger case, Gudger had hired a vehicle to transport the liquor from Lynchburg, Virginia to another place in Virginia and thence to North Carolina, the case would have been different from that actually considered, i. e., that Gudger had a through ticket from Baltimore, Md. to Asheville, N. C. and at no time transported the liquor into Virginia.

The Court read the statute in accordance with its normal meaning and intent and with its simple language and said:

"Under this state of facts we think the court was clearly right in quashing the indictment, as we are of opinion that there is no ground for holding that the prohibition of the statute against transporting liquor in interstate commerce 'into any State or Territory
115 the laws of which State or Territory prohibit the manufacture etc., includes, the movement in interstate commerce through such a State to another. No elucidation of the text is needed to add cogency to this plain meaning, which would however be reinforced by the context if there were need to resort to it, since the context makes clear that the word 'into,' as used in the statute, refers to the State of destination, and not to the means by which that end is reached, the movement through one State as a mere incident of transportation to the State into which it is shipped."

The Gudger case is quite different in principle from that at bar where any transportation is prohibited except that which is definitely excepted.

It is urged, however, that Section 3005 of U. S. Revised Statute has not been repealed. That Section provides:

"All merchandise arriving at any port of the United States destined for any foreign country may be entered at the custom-house, and conveyed in transit, through the territory of the United States, without the payment of duties, under such regulations as to examination and transportation as the Secretary of the Treasury may prescribe."

Title II of Section 35 of the National Prohibition Act provides:

"All provisions of law that are inconsistent with this Act are repealed only to the extent of such inconsistency and the regulations herein provided for the manufacture or traffic in intoxicating liquor shall be construed as in addition to existing laws."

Repeals by implication are not favored, but where a later statute is plainly inconsistent with a prior statute, the later statute necessarily repeals the prior statute.

116 Section 3005 was a revenue act or, in other words, it exempted from customs duties, merchandise which otherwise, would have been subject to duty. In the case at bar, the liquor was not subject to duty. It could not be imported. The introduction into this country from some foreign port of liquor for beverage purposes has no relation to revenues. Such liquor could not be lawfully introduced into this country because of the change in the national policy.

The very reason, therefore, for Section 3005 disappears so far as affects intoxicating liquor for beverage purposes.

In *United States v. Yuginovich*, U. S. Supreme Court, June 1, 1921, the court said:

"These statutes have only been part of the Federal internal revenue legislation, and were passed under the authority of the taxing power conferred upon Congress by the Constitution of the United States. At the time of their enactment it was legal, so far as the Federal Government was concerned, to manufacture and sell ardent spirits for beverage purposes. The Government derived large revenue from taxing the business, which it sought to realize and protect by the system of laws of which the sections in question were a part. This policy was radically changed by the adoption of the Eighteenth Amendment to the Federal Constitution, and the enactment of legislation to make the Amendment effective. The Eighteenth Amendment in comprehensive and clear language prohibits the manufacture or sale of intoxicating liquors in the United States for beverage purposes, and confers upon Congress the power to enforce the Amendment by appropriate legislation. To this end, Congress passed a national prohibition law known as the Volstead Act. 41 Stat. 305. It is a comprehensive statute intended to prevent the manufacture and sale of intoxicating liquors for beverage purposes * * *

It is, of course, settled that repeals by implication are not favored. It is equally well settled that a later statute repeals former ones when clearly inconsistent with the earlier enactments. *United States v. Tyner*, 11 Wall. 88 * * *

The concluding phrase of Section 35 by itself considered is strongly indicative of an intention to retain the old laws. But this section must be interpreted in view of the constitutional provision contained in the Eighteenth Amendment and in view of the provisions of the Volstead Act intended to make that Amendment effective * * *

In other words, Section 3005 and Section 3 of the National Prohibition Act are inconsistent and the former cannot stand. If the Congress has the power to permit this transshipment, it must indicate its purpose so to do and this it has not done.

Finally, it is said that the transshipment is allowable within the Treaty rights of the Treaty of Washington proclaimed July 4, 1871 between the United States and Great Britain. Presidents Cleveland and Harrison held that Article XXIX of the treaty was abrogated.

A court of first instance will not take a contrary view.

Nor does the case come within the Treaty of December 22, 1815.

An elaborate discussion by this Court of these treaties is deemed not necessary.

118 Motion denied and bill dismissed with costs October 21, 1921.

Circuit Judge.

119 At a Stated Term of the District Court of the United States for the Southern District of New York Held in the Court-rooms Thereof, at the Post Office Building, in the Borough of Manhattan, City of New York, on the 31 Day of Oct, 1921.

Present: Honorable Julius M. Mayer.

In Equity,

22—52.

THE ANCHOR LINE (HENDERSON BROTHERS), LTD., Complainant
against

GEORGE W. ALDRIDGE, Collector of Customs for the Port of New York,
Defendant.

This cause came on to be heard at this term and was argued by counsel; and thereupon, upon consideration thereof, it was

Ordered, adjudged and decreed that the bill of complaint herein be dismissed and defendant have judgment against the complainant for his costs to be taxed, and it was further

Ordered, adjudged and decreed that the order to show cause, entered herein on the 18th day of July, 1921, restraining the defendant, George W. Aldridge, his agents, servants and subordinate from seizing, disturbing, removing, or in any way interfering with the wines and intoxicating liquors or any of them referred to in said order, is hereby vacated and dissolved, and it was

Further ordered, adjudged and decreed that the United States Marshal in and for the Southern District of New York be and he hereby is directed to continue to hold in his custody for safe keeping the five cases of whiskey consigned by Gilmour Thompson and Company of Glasgow, Scotland, to Burrows & Company, of Hamilton, Bermuda, as described in the bill of complaint herein, pending the determination of an appeal herein to the Supreme Court of the United States and until the entry of the final decree herein upon the mandate from said Court.

JULIUS M. MAYER,
U. S. C. J.

Consented to as to form. Notice of settlement waived.
Oct. 31, 1921.

LORD, DAY & LORD,
Solr. for Complainants.

121 United States District Court, Southern District of New York.

THE ANCHOR LINE (HENDERSON BROTHERS), LTD., Complainant,
against

GEORGE W. ALDRIDGE, Collector of Customs for the Port of New York,
Defendant.

The complainant above named, The Anchor Line (Henderson Brothers) Ltd., a corporation conceiving itself aggrieved by the final decree made and entered in the above entitled cause on the 31st day of October, 1921, does hereby appeal from such final decree to the Supreme Court of the United States for the reasons specified in the assignment of errors which is filed herewith, from which it appears that this cause is appealable directly from this court to the said Supreme Court of the United States under Section 238 of the Judicial Code and said The Anchor Line (Henderson Brothers) Ltd., prays that it be allowed this appeal and that a transcript of the record, papers, and proceedings upon which said final decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

Dated, New York, November 15th, 1921.

LORD, DAY & LORD,
Solicitors for Complainant.

Office & P. O. Address: 25 Broadway, Borough of Manhattan,
City of New York.

Appeal allowed.

JNO. C. KNOX,
Judge.

123 By the Honorable John C. Knox, one of the United States District Judges for the Southern District of New York, in the Second Circuit, to George W. Aldridge, Collector of Customs for the Port of New York, Greeting:

You are hereby cited and admonished to be and appear before the United States Supreme Court, to be holden in the City of Washington, District of Columbia, on the 16th day of December, 1921, pursuant to an appeal filed in the Clerk's Office of the District Court of the United States for the Southern District of New York, wherein The Anchor Line (Henderson Brothers) Ltd. is complainant-appellant and you are defendant-appellee to show cause, if any there be, why the final decree in said appeal mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Given under my hand at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, this 17th day of November, in the year of our Lord One Thousand Nine

Hundred and twenty-one, and of the Independence of the
124 United States the One Hundred and Forty-Sixth.

JNO. C. KNOX,
*United States District Judge
for the Southern District
of New York, in the Sec-
ond Circuit.*

125 United States District Court, Southern District of New York

THE ANCHOR LINE (HENDERSON BROTHERS), LTD., Complainant
against

GEORGE W. ALDRIDGE, Collector of Customs for the Port of New York,
Defendant.

Now comes the complainant, The Anchor Line (Henderson Brothers) Ltd., a corporation, and files the following assignment of errors upon which it will rely on its appeal from the judgment or decree in equity entered on the thirty first day of October, 1921:

First. That the Court erred in dismissing the bill of complaint herein.

Second. That the Court erred in denying the petition for an injunction.

Third. That the Court erred in holding that Section 3005 of the Revised Statutes has been repealed by act of Congress of
126 October 28th, 1919, known as the National Prohibition Act.

Fourth. That the Court erred in holding that Section 3005 of the Revised Statutes which relates to the transshipment of merchandise in bond does not apply to intoxicating liquors for beverage purposes, although they are to be used without the United States, and that

the National Prohibition Act prohibits "in transit" shipments of liquor for beverage purposes touching at ports of or moving through the United States, though the same originate in and are destined to foreign countries.

Fifth. That the interpretation of the Act of Congress of October 28th, 1919, known as the National Prohibition Act, by the Court, renders said Act unconstitutional and void, and that the Court erred in so interpreting said Act.

Sixth. That the Court erred in failing to hold that Congress was without power under the Eighteenth Amendment to the Constitution of the United States to prohibit the transshipment of liquor in ports of the United States or moving through the United States when the same originate in and are destined to foreign countries.

127 Seventh. That the Court erred in holding that the Eighteenth Amendment to the Constitution of the United States prohibits the transshipment in ports of the United States of shipments of wines and intoxicating liquors originating in and destined to foreign countries.

Eighth. That the Court erred in holding that Title II of the Act of Congress of October 28th, 1919, known as the National Prohibition Act, prohibits the transshipment of liquor for beverage purposes touching at ports of or moving through the United States, though the same originate in and are destined to foreign countries.

Ninth. That the Court erred in failing to hold that transshipment in ports of the United States of shipments of wines and intoxicating liquors originating in and destined to a foreign country is permitted by the treaties between the United States and Great Britain, particularly the treaty of May 8th, 1871, ratified June 17th, 1871, and proclaimed July 4th, 1871, and particularly Article XXIX thereof.

Wherefore, complainant-appellant prays that the said decree of the United States District Court for the Southern District of New York be reversed, and an injunction granted the complainant as prayed for in its said bill of complaint herein, and for such other and further relief as to the Court may seem just and proper.

Dated, New York, November 15th, 1921.

LORD, DAY & LORD,
Solicitors for Complainant-Appellant.

Office & Post Office Address, 25 Broadway, Borough of Manhattan,
City of New York.

129 In the District Court of the United States for the Southern District of New York.

THE ANCHOR LINE (HENDERSON BROTHERS) LTD., Complainant,
against

GEORGE W. ALDRIDGE, Collector of Customs for the Port of New York, Defendant.

It is hereby stipulated pursuant to Rule 8 of the Supreme Court of the United States that the following papers shall constitute the transcript of record on appeal herein to the Supreme Court of the United States from the final decree entered in the above entitled cause on the 31st day of October, 1921.

1. Subpœna.
2. Bill of complaint and order to show cause dated July 18, 1921.
3. Amended bill of complaint.
4. Answer.
5. Order of July 25, 1921 directing the United States Marshal to take into his custody for safe-keeping five cases of whiskey consigned by Gilmour, Thompson & Company, Glasgow, Scotland, to Burrows & Company, Hamilton, Bermuda.
- 130 6. Notice of Motion of complainant for judgment on the pleadings.
7. Opinion of Mayer, C. J.
8. Final decree entered herein October 31, 1921.
9. Petition on appeal and allowance.
10. Citation.
11. Assignment of Errors.
12. Stipulation as to sufficiency of record.

Dated, New York, November 15th, 1921.

LORD, DAY & LORD,
Solicitors for Complainant.

Office & P. O. Address, 25 Broadway, New York City.

WM. HAYWARD,
United States Attorney, Solicitor for Defendant.

Post Office Building, New York City.

131 In the District Court of the United States for the Southern District of New York.

THE ANCHOR LINE (HENDERSON BROTHERS) LTD., Complainant,
against

GEORGE W. ALDRIDGE, Collector of Customs for the Port of New York, Defendant.

It is hereby stipulated and agreed by and between the solicitors for the respective parties hereto that the foregoing are true and complete transcripts of the pleadings, the Order to Show Cause, the Order of July 25, 1921, Opinion of Mayer, Circuit Judge, and the Final Decree entered herein on October 31, 1921, and of the application of the complainant for, and the allowance of an appeal to the Supreme Court of the United States.

Dated, New York, November 15th, 1921.

LORD, DAY & LORD,
Solicitors for Complainant.

Office & P. O. Address, 25 Broadway, New York City.

WM. HAYWARD,
United States Attorney, Solicitor for Defendant.

Post Office Building, New York City.

132 UNITED STATES OF AMERICA,
Southern District of New York, etc.

THE ANCHOR LINE (HENDERSON BROTHERS) LTD., Complainant,
vs.

GEORGE W. ALDRIDGE, Collector of Customs for the Port of New York.

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby Certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 22d day of November in the year of our Lord one thousand nine hundred and twenty-one and of the Independence of the said United States the one hundred and forty-sixth.

[Seal of District Court of the United States, Southern District of N. Y.]

ALEX. GILCHRIST, JR.,
Clerk.

133 [Endorsed:] In Equity. 22-52. United States Supreme Court. The Anchor Line (Henderson Brothers) Ltd., Complainant-Appellant, against George W. Aldridge, Collector of Customs for the Port of New York, Defendant-Respondent. Record on Appeal. Lord, Day & Lord, Solicitors for Complainant-Appellant, 25 Broadway, New York City.

Endorsed on cover: File No. 28,594. S. New York D. C. U. S. Term No. 639. The Anchor Line (Henderson Brothers), Ltd., appellant, vs. George W. Aldridge, collector of customs for the port of New York. Filed December 9th, 1921. File No. 28,594.

(5449)

In the Supreme Court of the United States.

OCTOBER TERM, 1921.

JOHN A. GROGAN, COLLECTOR OF INTERNAL Revenue for the First District of Michigan, and Richard I. Lawson, Collector of Customs for the Eastern District of Michigan, appellants, v.
HIRAM WALKER & SONS (LTD.)

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

THE ANCHOR LINE (HENDERSON BROTHERS), (Ltd.), appellant, v.
GEORGE W. ALDRIDGE, COLLECTOR OF Customs for the Port of New York.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

MOTION TO ADVANCE.

Comes now the Solicitor General on behalf of the appellants in case No. 615, and the appellee in No. 639, and respectfully moves the court to advance

these cases for argument on some day of the present term convenient to the court.

These suits were brought to restrain Government officers from seizing two shipments of liquor while in the United States, one of which was being shipped from Scotland to Bermuda via the port of New York, and the other from Canada to Mexico via the port of Detroit.

They involve the application of the National Prohibition Act to shipments of liquor from one foreign country to another, or the same, through territory of the United States, and present the question whether the treaty of July 4, 1871, between the United States and Great Britain, and section 3005 of the Revised Statutes (which exempted from customs duties merchandise arriving in this country destined for foreign countries, which otherwise would have been subject to duty) are inconsistent with, and therefore repealed by, section 3 of Title 11 of the national prohibition act (41 Stat. 308), which provides as follows:

No person shall on or after the date when the eighteenth amendment to the Constitution of the United States goes into effect manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor except as authorized by this act, and all the provisions of this act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented.

Liquor for nonbeverage purposes and wine for sacramental purposes may be manufac-

tured, purchased, sold, bartered, transported, imported, exported, delivered, furnished and possessed, but only as herein provided, and the commissioner may, upon application, issue permits therefor: * * *.

In the Walker case, decided August 23, 1921, the District Court for the Eastern District of Michigan held that the treaty with Great Britain and section 3005 of the Revised Statutes were not repealed for the reason that the national prohibition act did not apply to shipments of liquor to the United States for the purpose of being reshipped to another country, whereas in the Anchor Line case the District Court for the Southern District of New York held that the treaty with Great Britain was abrogated and that section 3005 of the Revised Statutes was repealed by the national prohibition act, which prohibited such shipments.

The conflict between these two decisions has caused much confusion and uncertainty and the enforcement of the prohibition law has consequently been rendered more difficult, to the embarrassment of the Federal Government and the general public. It is therefore important that an early hearing may be had in these cases.

Notice of this motion has been served on opposing counsel.

JAMES M. BECK,
Solicitor General.

FEBRUARY, 1922.



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In the Supreme Court of the United States.

OCTOBER TERM, 1921.

JOHN A. GROGAN, COLLECTOR OF INTERNAL REVENUE, et al, appellants,
v.
HIRAM WALKER & SONS (LTD.). } No. 615.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

THE ANCHOR LINE (HENDERSON BROTHERS) (Ltd.), appellant,
v.
GEORGE W. ALDRIDGE, COLLECTOR OF CUSTOMS FOR THE PORT OF NEW YORK. } No. 639.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE APPELLANTS IN NO. 615 AND FOR THE APPELLEE IN NO. 639.

INTRODUCTORY STATEMENT.

These are suits to enjoin officers of the United States from enforcing the provisions of the eighteenth amendment to the Constitution and the national prohibition act¹ against shipments of liquor (*a*) from

¹Called interchangeably "national prohibition act," "prohibition act," and "Volstead Act."

one foreign country through territory of the United States to another foreign country and (b) from a foreign country into the port of New York for transhipment to another foreign country. The right to transport liquor into and through the United States for export to points outside the United States is asserted under the provisions of section 3005 of the Revised Statutes and Article XXIX of the Treaty with Great Britain proclaimed July 4, 1871. Whether those provisions ever conferred the right claimed, and if so, the extent to which such right has been modified or abrogated by the eighteenth amendment and the prohibition act, are the questions presented. The cases come directly to this court under section 238 of the Judicial Code on the ground that there is drawn in question (1) the construction and application of the Constitution of the United States; (2) the construction or validity of a treaty and (3) the constitutionality of a law of the United States. The two lower courts having arrived at opposite conclusions, giving rise to much confusion and embarrassment in the enforcement of the prohibition act, the necessity of a prompt decision by this court is manifest.

THE FACTS IN CASE NO. 615.

Bill of complaint.

Hiram Walker & Sons (Ltd.), a corporation of the Province of Ontario, brought its bill in the United States District Court for the Eastern District of Michigan to enjoin the collector of internal revenue

and the collector of customs for that district from interfering with and preventing the shipment of whiskey from its plant at Walkerville, Ontario, into the port of Detroit for conveyance to other ports of the United States to be there exported to points outside the United States. (Rec. 1-11.)

The bill alleged that pursuant to section 3005 of the Revised Statutes and Article XXIX of the treaty of 1871 plaintiff has for many years conducted a large and profitable business in the exportation of whiskey through the United States to foreign countries; that in 1920 a total of 86,815 cases, aggregating \$700,982 in value, was exported in this way, with a loss of only 286 cases of the value of \$2,330; that if plaintiff were compelled to convey its whiskey to Mexico, South and Central America otherwise than in transit in bond through the United States, the increased transportation costs and delay in deliveries would greatly impair if not destroy its foreign business. (Rec. 3-4.)

That on February 14, 1921, plaintiff presented to agents of the collector of customs at Detroit 25 cases of whiskey to be conveyed in bond through the United States to customers in Mexico; that defendant, collector of customs, purporting to act under the Volstead law, seized said shipment and still retains the same; that on July 14, 1921, plaintiff notified agents of defendant collector of customs that it desired to make a further shipment of liquor through Detroit to New Orleans, for transshipment by water to Puerto Barrios, in Guatemala; that representatives of the collector replied that such shipment on arrival

at the port of Detroit, would be seized unless plaintiff should obtain a permit from the State prohibition director; that such permit was duly applied for and refused; and that plaintiff is informed and believes that the defendant, collector of internal revenue, acting as agent of the Commissioner of Internal Revenue, under the Treasury Department's interpretation of the Volstead Act, will institute criminal proceedings against plaintiff and its property offered for export through the United States. (Rec. 4-7.)

The bill then avers that the eighteenth amendment relates only to intoxicating liquors "for beverage purposes"; that there is no provision either in the eighteenth amendment or in the Volstead Act declaring or making unlawful the conveyance of whiskey in bond through the United States for export to foreign countries; that such conveyance is expressly authorized by section 3005 of the Revised Statutes and Article XXIX of the treaty of 1871, and that if said Volstead Act shall be construed so as to forbid or prevent such conveyance in transit in bond "then such construction would make such act unconstitutional." (Rec. 7.)

The prayer is that both defendants be enjoined from further interfering with the in-transit shipment of whiskey from plaintiff's plant through the United States to foreign countries; that defendants be required to return to plaintiff the shipment of whiskey seized as alleged and which they are now holding; and that defendants be enjoined from enforcing the provisions of the Volstead law against plaintiff

or its property on the ground that the transportation of whiskey in the manner described constitutes a violation of such law. (Rec. 10-11.)

A rule to show cause was issued and a temporary restraining order granted (Rec. 12-14).

The answer.

Defendants thereupon answered, admitting substantially all allegations of fact set up in the bill, but denying the conclusions of law as to the interpretation of the eighteenth amendment and the Volstead Act, and the applicability of section 3005 of the Revised Statutes and the Treaty of 1871 to the transshipment of whiskey. (Rec. 16-18.)

In addition, the answer averred that the continued transportation of whiskey through the United States would result in a portion of said whiskey remaining in the United States in violation of law due to thefts and other unlawful withdrawals while in storage and en route. Counsel stipulated that the issues made by bill and answer were issues of law which could be determined without the necessity of taking proof; and further, "that the whiskey in controversy was and is intended for consumption as beverage whiskey."

The decision.

District Judge Tuttle, on final hearing, entered a decree permanently enjoining the defendants in accordance with the prayer of the bill. (Rec. 20-26.)

His opinion may be reduced to the following propositions: (1) That while, by a strict construction, the

Volstead Act in terms prohibits the shipments under consideration, yet under the doctrine of the *Holy Trinity Church Case*, 143 U. S. 457, the court may look beneath the words to the purpose and intentment of the act; (2) that as the eighteenth amendment expressly relates to liquors intended "for beverage purposes," and as Congress has expressed its intention that the Volstead Act should be construed "to the end that the use of intoxicating liquor as a beverage may be prevented," it follows that the underlying purpose of the act was the prevention of the use of intoxicating liquor as a beverage *within the United States*; (3) that the prohibition in the amendment and the act against the "exportation" of intoxicating liquor from the United States does not negative the intention thus attributed to Congress to confine their application to the use of such liquor within the United States; (4) that Congress passed the Volstead Act with knowledge of the right to transship enjoyed under existing acts and treaties, and the failure expressly to repeal gives rise to an inference that such right should continue; (5) that as repeals by implication are not favored, the Volstead Act will not be construed to have repealed section 3005, Revised Statutes, if effect can be given to both; (6) that for like reasons a treaty between the United States and a foreign Government will not be regarded as abrogated by a subsequent statute unless an intention so to do is clearly and unequivocally indicated; (7) that Article XXIX of the treaty of 1871 has not expired by limitation nor been expressly abrogated; (8) that the contention that continued

shipments of whiskey through the United States will result in unlawful removals and thefts is overcome by the presumption that public officers will faithfully perform their duty; and (9) that the express exception in section 20, Title III, of shipments through the Panama Canal and over the Panama Railroad is not indicative of an intention to prohibit all other "in transit" shipments. (Rec. 20-26; 275 Fed. 373.)

THE FACTS IN CASE NO. 639.

Bill of complaint.

In this case The Anchor Line (Ltd.), a corporation of Great Britain, engaged in the operation of steamships from ports of the United Kingdom to ports of Europe, Canada, and the United States, filed its bill and amended bill in the United States District Court for the Southern District of New York to prevent the collector of customs from seizing, under the Volstead Act, shipments of intoxicating liquors transported by its steamers from foreign ports to the port of New York for transshipment to other foreign ports. (Rec. 14-24.)

The amended bill alleges that plaintiff during the past three years has transported large quantities of wines and intoxicating liquors from Glasgow to the port of New York, where such liquors were transshipped to vessels destined for the West Indies and other countries outside the jurisdiction of the United States, and that a substantial part of plaintiff's revenue is derived from the transportation of such liquors. (Rec. 15.)

Section 3005 of the Revised Statutes and Article XXIX of the treaty of 1871 are set up as in the Walker case, and the same rights thereunder are alleged. (Rec. 15, 17-18.)

It is further alleged that plaintiff has contracted with a shipper in Glasgow to transport 25 cases of whiskey from Glasgow to Hamilton, Bermuda; that said whiskey has been shipped and is now in transportation on the S. S. *Cameronia*, on the high seas; that such liquor is to be transshipped at New York from the *Cameronia* to another vessel plying between New York and Hamilton; and that defendant collector of customs, acting under the direction of the Treasury Department, has threatened to seize and forfeit said whiskey on arrival and has refused to issue permits for transshipment in the port of New York. (Rec. 18.)

Plaintiff is advised by counsel and therefore avers that section 3005, Revised Statutes, has not been impaired or repealed by the Volstead Act; that the Volstead Act does not apply to the transshipment of liquors at ports of the United States in the manner set forth in the bill; that the interpretation given by the Attorney General and the Treasury Department to the effect that it applies to such transshipments is erroneous; and that if the Volstead Act purports to prohibit such transshipments it is unconstitutional and void. (Rec. 16-17, 19-20.)

As in the Walker case, the prayer was that the defendant collector be enjoined from enforcing the provisions of the Volstead law against the plaintiff,

and that he be enjoined from refusing plaintiff a permit to transship liquors in accordance with section 3005 of the Revised Statutes. (Rec. 20.)

On July 22, 1921, an order was entered by the District Court directing the United States marshal on arrival of the S. S. *Cameronia* to take into custody for safekeeping the consignment of whiskey mentioned in the bill of complaint. (Rec. 49.)

The answer.

Defendant filed a combined motion to dismiss and answer which admitted the principal allegations of fact but expressly denied that the treaty of 1871 was still in effect and denied all conclusions of law pleaded in the bill. (Rec. 24-30.)

For a separate and distinct defense defendant alleged that the amount of liquor transshipped at the port of New York during the past three years has been large; that in all cases of such liquors arriving by vessel the responsibility of the importing vessel appears to cease forty-eight hours after landing of the shipment or upon delivery to a Government truckman or lighterman; that such liquors are frequently to be exported by a vessel berthed at a different dock and scheduled to sail sometimes as much as twelve days after the landing of the importing vessel; that in some cases the dock from which the exporting vessels sail is as much as six or seven miles by land or water from the berth of the incoming vessel; that in all cases there elapses some time, of perhaps a day or more, and there is involved some carriage by land or water or both, and that such

lapse of time and necessity of carriage has subjected such liquors to pilferage, loss, and other unlawful disposition. (Rec. pp. 26-27.)

The answer further averred that both in cases of importation by water and by rail there have been heavy losses of intoxicating liquors destined for foreign countries, and that, on information and belief, such liquors were purloined or stolen and ultimately found their way into consumption for beverage purposes in the United States. (Rec. 27.)

Annexed to the answer as exhibits were schedules prepared by the collector of customs showing instances between July 1, 1919, and July 1, 1921, in which losses occurred in consignments of liquor being transshipped in New York between the time the goods were landed and the time of their arrival on the exporting vessel. (Rec. 27, 31-39.) Specific reference was made of the theft of a barge containing 174 drums of alcohol, of which only 29 drums were subsequently recovered. (Rec. 27.)

In addition, the answer averred that if plaintiff's contention is correct, then it follows as a corollary that any foreign vessel transporting liquor and bearing clearance papers from one foreign port to another may cruise at will in the territorial waters of the United States, rendering well-nigh impossible the already difficult task of preventing the smuggling of intoxicating liquor into the United States. (Rec. 29-30.) And in this connection the answer alleges, on information and belief, that a large and profitable business has been carried on by American citizens

with the object and result of importing liquor into the United States in violation of law; that the vessels employed by such persons are under British registry and sail out of a British port in the Bahama Islands with clearance papers for Halifax, another British port; that one such vessel is now under seizure in New York and that another recently was forced into the port of Philadelphia by stress of weather. (*Id.*)

The decision.

The case was heard by Circuit Judge Mayer, who dismissed the plaintiff's bill (Rec. 56-57), holding: (1) The national prohibition act taken literally absolutely prohibits the transportation which plaintiff finds necessary for its purposes; (2) the Congress had plenary power to prohibit the transportation of liquor for beverage purposes, even if intended for use outside of the United States; (3) the act provides a method by which intoxicating liquors for nonbeverage purposes may be transported, and the fact that the transshipment of liquors is not included in the means provided, indicates that Congress did not intend an exception; (4) that the act, in line with the amendment, expressly forbids the "exportation" of intoxicating liquors for beverage purposes; (5) the act in this particular amounts to a practical construction of the amendment to the effect that it absolutely destroys all traffic in intoxicating liquors for beverage purposes even though intended for use outside the United States; (6) Congress had the right to set up safeguards against the wrongful diversion of intox-

eating liquors; (7) section 3005 of the Revised Statutes is of doubtful application, since it is a revenue statute and exempts from customs duties merchandise which otherwise would be dutiable, whereas the shipments in question were not subject to duty, could not have been imported, and the subject has no relation to revenue; (8) while repeals by implication are not favored, where a later statute is plainly inconsistent with a prior one, the latter necessarily repeals the former; (9) section 3, Title II, of the Volstead Act and section 3005 of the Revised Statutes are inconsistent in terms, and to the extent that the latter has any bearing on the case, it must be deemed to have been repealed; (10) Presidents Cleveland and Harrison having held that the treaty of 1871 was abrogated, a court of first instance will not take a contrary view.

CONSTITUTIONAL, STATUTORY, AND TREATY PROVISIONS.

The applicable constitutional, statutory, and treaty provisions are as follows:

The eighteenth amendment:

* * * the manufacture, sale or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from, the United States and all territories subject to the jurisdiction thereof, for beverage purposes, is hereby prohibited.

Sec. 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

Section 3 of Title II of the Volstead Act:

No person shall on or after the date when the eighteenth amendment to the Constitution of the United States goes into effect manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor except as authorized by this act, and all the provisions of this act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented.

Liquor for nonbeverage purposes and wine for sacramental purposes may be manufactured, purchased, sold, bartered, transported, imported, exported, delivered, furnished and possessed, but only as herein provided, and the commissioner may, upon application, issue permits therefor: * * *. (Ch. 85, 41 Stat., pp. 308-309.)

Section 3005, Revised Statutes, as amended:

All merchandise arriving at any port of the United States destined for any foreign country, may be entered at the customhouse and conveyed, in transit, through the territory of the United States without the payment of duties, under such regulations as to examination and transportation as the Secretary of the Treasury may prescribe.

Article XXIX of the treaty with Great Britain concluded May 8, 1871, and proclaimed July 4, 1871:

It is agreed that, for the term of years mentioned in Article XXXIII, of this treaty, goods, wares, or merchandise arriving at the

ports of New York, Boston and Portland and any other ports in the United States which have been or may, from time to time, be specially designated by the President of the United States and destined for Her Britannic Majesty's possessions in North America, may be entered at the proper customhouse, and conveyed in transit, without the payment of duties through the territory of the United States, under such rules, regulations and conditions for the protection of the revenue as the Government of the United States may from time to time prescribe; and under like rules, regulations and conditions, goods, wares, or merchandise may be conveyed in transit, without the payment of duties, from such possessions through the territory of the United States for export from the said ports of the United States; and under like rules, regulations, and conditions, goods, wares, or merchandise may be conveyed in transit, without the payment of duties, from such possessions through the territory of the United States for export from the said ports of the United States. (Treaties, conventions, &c., vol. 1, pp. 711-712, Senate Doc. No. 357, 61st Cong., 2d sess.)

ASSIGNMENTS OF ERROR IN NO. 615.

The District Court erred:

1. In holding that the national prohibition act does not forbid the transportation of intoxicating liquor intended for beverage purposes, from Canada to a foreign country, by transshipment, in bond, through the United States.

2. In holding that the treaty between Great Britain and the United States proclaimed July 4, 1871, was not abrogated by the adoption of the eighteenth amendment to the Constitution and the passage of the national prohibition act so far as said treaty relates to liquors for beverage purposes.
3. In holding that said treaty was not abrogated and terminated by the executive branch of the United States prior to the adoption of the eighteenth amendment to the Constitution of the United States and the passage of the national prohibition act, so far as said treaty relates to the transshipment of merchandise from the British possessions to foreign countries and through the United States.
4. In holding that section 3005, Revised Statutes, was not repealed by the national prohibition act so far as said section pertains to intoxicating liquor for beverage purposes.
5. In holding that the national prohibition act and the regulations lawfully promulgated thereunder, permit the transportation of intoxicating liquor from Canada to a foreign country, by transshipment in bond, through the United States, under regulations pursuant to the treaty aforesaid and section 3005, Revised Statutes. (Printed in full, Rec. 28-31.)

ARGUMENT.**I.**

THE EIGHTEENTH AMENDMENT AND THE NATIONAL PROHIBITION ACT APPLY TO AND PROHIBIT THE TRANSSHIPMENT¹ OF INTOXICATING LIQUORS FOR BEVERAGE PURPOSES IN OR THROUGH THE UNITED STATES.

1. Such transshipments are within the very terms of the amendment and act.—The eighteenth amendment and section 3 of Title II of the Volstead Act expressly prohibit the “transportation” of intoxicating liquors within, the “importation” thereof into, or the “exportation” thereof from, the United States for beverage purposes.

In addition, the Volstead Act provides that no person shall “deliver,” “furnish,” or “possess” any intoxicating liquor “except as authorized in the act.” And further, that all provisions of the act “shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented.”

The transshipment of intoxicating liquor in and through the United States necessarily involves “importing,” “exporting,” “possessing,” “transporting,” “furnishing,” and “delivering” such liquor. The wording of the amendment and act, therefore, plainly includes transshipment of intoxicating liquors, as was conceded by counsel for Hiram Walker & Sons (Ltd.) in the District Court. (Rec. No. 615, p. 22.)

¹ For convenience the word “transshipment” will be used to designate both the transshipments at the port of New York involved in the *Anchor Line Case*, No. 639, and the transshipments and “in transit” conveyances involved in the *Walker Case*, No. 615.

Nowhere does the act expressly authorize such transshipment or "in transit" conveyance of liquor; therefore, under the very terms of the act they must be deemed to be prohibited.

2. *The plain object of the amendment and act was to destroy all traffic in or dealing with intoxicating liquors.*—Counsel for complainants argue that the amendment and statute have as their object the prohibiting of the *use* of intoxicating liquor in the United States, and that as the transshipment of liquor in and through the United States does not directly contribute to such use (a proposition which we do not admit), it is not within their scope or spirit.

While the ultimate object is the prevention of the *use* of intoxicating liquors, it is evident that the immediate purpose is the destruction of all traffic in or dealing with the interdicted commodities.

This follows from the language employed. Neither the eighteenth amendment nor the prohibition act in terms forbids the *use* of intoxicating liquors. As recently pointed out by Mr. Justice McReynolds, they are concerned merely with the incidents of ownership, such as the manufacture, sale, transportation possession, etc. *Street v. Lincoln Safe Deposit Co.*, 254 U. S. 88, 95.

The reason for this is that in dealing with a situation such as the liquor evil by constitutional amendment or legislation, a more effective method of eradicating it is by preventing the means by which it comes into being, than by direct inhibition on the use.

Had the eighteenth amendment and the Volstead Act provided simply an inhibition on the use or

consumption of intoxicating liquors, there might be room for the contention that such inhibition did not extend to the possession or transportation of liquor not intended for beverage use in the United States. But such was not the language employed.

The truth of the matter is that both the amendment and the statute have for their immediate purpose the suppression of all traffic in or dealing with intoxicating liquor within the United States. The ultimate object of such suppression is, of course, elimination of the use of intoxicants; but the amendment and the act are actually concerned with the means rather than the end.

3. The amendment and the act clearly were intended to prohibit the possession or transportation of liquor for beverage purposes, whether for consumption within the United States or without.—When the Volstead bill was under consideration in the Senate, there was added an amendment, now section 20, Title III, making it unlawful to import or introduce into the Canal Zone, or to manufacture, sell, transport, possess, etc., liquor within the Canal Zone. (58 Cong. Rec. 4895.) The amendment contained the following proviso:

Provided, That this section shall not apply to liquor in transit through the Panama Canal or on the Panama Railroad. (41 Stat. 322.)

It is impossible to understand why this proviso was made to section 20, Title III, while no similar clause was added to section 3, Title II, if Congress

really intended to exempt from the latter the transhipment of liquors. The rule *expressio unius est exclusio alterius* applies.

Again, both the eighteenth amendment and the prohibition act expressly prohibit the *exportation* of intoxicating liquors *from* the United States. Such prohibition is inconsistent with an intention to restrict their application to liquors intended for consumption in the United States.

The conclusion of the District Court in No. 615 (Rec. 24-25) to the effect that this provision is without significance for the reason that "exportation" necessarily comprehends manufacture within the United States, in violation of law, robs the provision of all meaning and is untenable.

The manufacture of intoxicating liquors was expressly forbidden by the Volstead Act, and had been prohibited for some time prior thereto by war-time legislation. The provision in said act against exportation can not, therefore, be restricted to liquors manufactured in violation of law. The provision relates to *all* exportations of liquor, whatever the circumstances attending its manufacture.

At the time the Volstead Act was passed there was stored in bonded warehouses many millions of gallons of distilled spirits manufactured in this country strictly in accordance with law. (See opinion of this Court in *Hamilton v. Kentucky Distilleries*, 251 U. S. 146, 158, *footnote*.) In spite of the urgent pleas of the owners, Congress, in passing the Vol-

stead Act, absolutely prohibited the exportation of this surplus.

This liquor was bonded, tagged, and labeled and could have been exported with no greater risk of loss than attends the "in transit" shipment of foreign liquor. But Congress forbade the exportation of this legally acquired liquor and it could have been led to that decision only through apprehension of the inevitable losses and diversions to unlawful usage attendant upon the transportation to seaboard.

It is hard to believe that Congress would prohibit American citizens from exporting valuable stocks of lawfully acquired liquor and at the same time allow aliens to flood the ports of the United States with liquor, and to transport large quantities thereof clear across the country, when the chances of loss by theft are no greater in the one case than in the other.

Or, assume two competing distillers on opposite sides of the Canadian border. Is it reasonable to suppose that Congress intended to say to the American distiller that his stock of lawfully acquired liquor must be kept in his warehouse and at the same time allow the Canadian distiller to transport his liquor at will past the American's door bound for Mexico and other foreign countries?

The inclusion in the amendment and the act of the ban on exportation conclusively points to the absolute prohibition of all transportation.

4. *The proceedings in Congress evidence the legislative intention to prohibit all possession and all transportation except as specifically authorized.*—The proceedings and debates attending the passage of the Volstead Act show that it was the earnest desire of a remarkably unanimous Congress to prohibit absolutely all methods of dealing with intoxicating liquors which experience had shown might lead to their diversion to beverage purposes.

Section 3 of Title II, being the omnibus section of the act, received special attention in both Houses of Congress. There was considerable opposition to the inclusion of the word "possess" in this section. For instance, Congressman Gard, of Ohio, in speaking of this section, said (58 Cong. Rec. 2449):

When we considered this section we had the word "use" after the word "possess." The word "use" has been stricken out and the word "possess" should be stricken out. The words "furnish" and "receive" in my opinion should be stricken out unless this House intends to write a bill so drastic as to make it appear in the eyes of the people of the United States that there is nothing in it except a bill of absolute prohibition.

But the word "possess" was retained by the conference committee and its retention was thought of such importance that the Senate conferees in their report (S. Rep. 151) justified it at considerable length:

The committee in the House struck out the word "use" after "possess" and retained the

word "possess" for good reasons. * * * These provisions are of the greatest importance to the officer who wants to enforce the law. They are based on experience in the States. If individuals are permitted to possess intoxicating liquor for beverage purposes outside the home, officers of the law are constantly embarrassed in their efforts to enforce the law. It is always a question whether the individual has the liquor legally or otherwise. * * * The strongest weapon that Congress can put into the hands of faithful law-enforcement officials will be a provision in this enforcement code to prohibit the possession of intoxicating liquor for beverage purposes, *except as specifically provided for in the act.* [Italics ours.]

In order to strengthen this provision against the "possession" of intoxicating liquor, section 33, Title II, was placed in the law, making possession "prima facie evidence that such liquor is kept for the purpose of being sold, bartered, exchanged, given away, furnished, or otherwise disposed of in violation of the provisions of this title" (41 Stat. 317).

The transshipment or "in transit" conveyance of intoxicating liquor necessarily involves the "possession" of such liquor as well as its "transportation." As shown by the opinion of District Judge Tuttle, this was conceded by opposing counsel in the Walker case in the court below (Rec. No. 615, p. 22; 275 Fed. 373, 376):

It is clear enough, and is, I understand, conceded by the plaintiff, that under a strict

construction of the language of the statute, the latter is sufficiently broad in its terms to prohibit the shipments under consideration, since it is undoubtedly necessary, in order to make such shipments, to both "possess" and "transport" intoxicating liquor within the United States.

As regards the word "transportation," it was practically the unanimous opinion of both Houses that all transportation of intoxicating liquors should be prohibited except in such cases as might be specially provided for. An examination of the debates discloses no instance of anyone questioning the inclusion of this word.

It is noteworthy that all of the amendments proposed for the evident purpose of weakening the law, while they omitted other provisions contained in the bill as passed, invariably included the prohibition against transportation. Thus, Congressman Igoe, leader of the opposition, moved that the bill be amended by striking out all after the enacting clause and that there be substituted a provision for punishing by fine of \$500 or imprisonment for one year "anyone who shall knowingly manufacture, sell, or *transport* within the United States, or import into the United States, or export from the United States, any intoxicating liquor." (58 Cong. Rec. 2976.) This persuasively indicates that it was the unanimous view of Congress that all transportation of liquor should be banned.

The legislative intent further appears from the provisions of sections 13 to 16 of Title II which subject carriers to the most stringent regulations in respect of the transportation of liquor under the permissive sections of the act. It seems incredible that the Congress which made such rigid provisions against evasion of the law through permissive transportation would have left without restrictions imposed in the act the great business of transshipping liquor at the ports of the United States and the conveying of it through the United States.

5. *The language of the amendment and act being plain, resort may not be had to construction to read out what is clearly included.*—The recent decisions of this court are unanimous to the effect that where the language of a statute is plain and unambiguous, it can not be divested of its obvious meaning by resort to construction. *Hamilton v. Rathbone*, 175 U. S. 414, 421; *United States v. Lexington Mill &c. Co.*, 232 U. S. 399, 409-10; *Adams Express Co. v. Kentucky*, 238 U. S. 190, 199; *Caminetti v. United States*, 242 U. S. 470, 485; *Thompson v. United States*, 246 U. S. 547, 551.

In *Thompson v. United States, supra*, the court said:

The intention of Congress is to be sought for primarily in the language used, and where this expresses an intention reasonably intelligible and plain it must be accepted without modification by resort to construction or conjecture.

And in *Caminetti v. United States, supra*, an extreme case, the court characterized the rules as "elementary," saying:

It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the law-making body which passed it, the sole function of the courts is to enforce it according to its terms. * * *

Where the language is plain and admits of no more than one meaning, the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion.

The case of *Holy Trinity Church v. United States*, 143 U. S. 457, and other cases relied on by plaintiffs, to the effect that under certain conditions courts will look beyond the letter of a statute to give effect to the obvious spirit and intent, have no application. In the *Holy Trinity case* this court held that the alien contract labor law did not apply to a contract between the Rev. E. Walpole Warren, an Englishman, and the Church of the Holy Trinity, a religious society incorporated under the laws of a State, whereby the former engaged to remove to the United States and enter into the service of the latter as rector. The conclusion was obvious and irresistible, and the case has gained prominence mainly because of the learned opinion by Mr. Justice Brewer. In that case, and in the others cited, the results which would follow from giving literal effect to the statutes involved

would have been absurd, bordering on grotesque. Indeed, the cases are scarcely less far-fetched than the historic instances from Puffendorf and Plowden, cited by Mr. Justice Brewer.

Neither have the cases of *United States v. Gudger*, 249 U. S. 373, and *Street v. Lincoln Safe Deposit Company*, 254 U. S. 88, any bearing. The former arose under the Reed amendment (act of March 3, 1917, 39 Stat. 1058, 1069), making unlawful the transportation of liquor "into any State or Territory the laws of which * * * prohibit the manufacture," etc., of liquor. The defendant was a passenger on a railroad train bound from Baltimore, Md., to Asheville, N. C., traveling on a through ticket. While the train was temporarily stopped at Lynchburg, Va., he was arrested, his baggage examined, and whiskey found. Although he had no intention of leaving the train at Lynchburg or elsewhere in Virginia, he was indicted for transporting liquor "into" Virginia in violation of law. This court affirmed the judgment of the District Court in quashing the indictment, saying (pp. 374-375):

* * * we think the court was clearly right in quashing the indictment, as we are of opinion that there is no ground for holding that the prohibition of the statute against transporting liquor in interstate commerce "into any State or Territory the laws of which State or Territory prohibit the manufacture," etc., includes the movement in interstate commerce through such a State to another. No elucidation of the text is needed to add

cogency to this plain meaning, which would however be reinforced by the context if there were need to resort to it, since the context makes clear that the word "into," as used in the statute, refers to the State of destination, and not to the means by which that end is reached, the movement through one State as a mere incident of transportation to the State into which it is shipped.

The Reed amendment, unlike the national prohibition act, did not prohibit transportation generally, but only transportation *into* a particular territory, and the court simply gave effect to the plain wording of the statute. The principle applied is the one contended for herein, and if applied in the instant cases will inevitably result in a holding that the shipments in question are violative of the prohibition law.

In *Street v. Lincoln Safe Deposit Co.* the owner of liquors lawfully acquired for personal consumption had stored them in a warehouse where, as alleged and admitted, they were in his "exclusive possession and control." Section 33 of the Volstead Act expressly authorizes the possession of liquors lawfully acquired in one's private dwelling house for personal consumption. The court held (1) that the warehouse keeper might permit such storage of liquors to continue after the effective date of the prohibition act; (2) that the warehouse owner did not unlawfully "possess" the liquors in violation of section 3 of Title II; and (3) that the act did not prohibit the transportation of the liquors from the warehouse to

the home of the owner, under permit from the Bureau of Internal Revenue.

The ground of decision, as explained in the later case of *Corneli v. Moore* (No. 174), decided January 30, 1922, was that by the admissions of the pleadings the liquor in question was "in the exclusive possession and control" of the owner, and the storage room "was obviously the use of a convenience very commonly employed and contributory to his dwelling." The court merely gave preference to a liberal interpretation of one of the permissive provisions of the act over a construction which would have resulted in the confiscation of liquors lawfully acquired. The difference between such a situation and that involved in the instant cases, where no permissive section is involved, is indicated by the following excerpt from the opinion (p. 93):

That transportation of the liquors to the home of appellant, under the admitted circumstances, is not such as is prohibited by the section is too apparent to justify detailed consideration of *the many provisions of the act inconsistent with a construction which would render such removal unlawful* * * *. (Italics ours.)

It is clear that this case has no bearing on the cases at bar; and it has been so narrowed and restricted in the later case of *Corneli v. Moore* as to have no application beyond its peculiar facts.

6. *The prohibition on transshipments will not be read out of the act on the ground that as applied to such*

transshipments it has extraterritorial effect.—It is argued that the national prohibition act if construed to forbid the transshipment in the United States of liquor in course of transportation from one country to another will give the act an extraterritorial effect, in that it will operate not merely to prevent the use of liquors in the United States but will extend its effect beyond the territorial limits of the United States, and that, as Congress can not be presumed to have intended such result, the law should not be so construed.

Unlike *American Banana Co. v. United Fruit Co.*, 213 U. S. 347, cited by the plaintiff in No. 615, there is involved in the present cases no attempt to apply the laws of the United States to acts committed in a foreign country. The thing prohibited is the possession or transportation of intoxicating liquor "within the United States."

A like contention was rejected by this court in *Strathearn S. S. Co. v. Dillon*, 252 U. S. 348. The statute there under consideration was section 4 of the seaman's act of March 4, 1915, ch. 153, 38 Stat. 1164, providing (1) that every seaman on a vessel of the United States shall be entitled to receive on demand from the master one-half of the wages which he shall then have earned, at every port where such vessel, after voyage has been commenced, shall load or deliver cargo before the voyage is ended; (2) that all stipulations in the contract of employment to the contrary shall be void; and (3) that the section shall

apply to seamen on foreign vessels while in harbors of the United States.

It was contended that the provision must be confined either (1) to American seamen or (2) to foreign seamen serving under contracts entered into in ports of the United States, since otherwise it would have the effect to invalidate contracts of employment entered into in foreign countries and valid where made, and would in effect amount to an attempt to regulate the making of such contracts outside the territorial limits of the United States. This court replied that the act merely regulated the relation of master and servant while a foreign vessel was in American harbors; that submission to such regulations was a condition precedent to the right to enter our ports, and that the imposition of such condition was within the constitutional authority of Congress.

The reasoning of the opinion is plainly applicable to the cases at bar.

II.

THE NATIONAL PROHIBITION ACT IN ITS APPLICATION TO THE TRANSSHIPMENT OF INTOXICATING LIQUOR FOR BEVERAGE PURPOSES IS CONSTITUTIONAL AND VALID.

1. *Fallacy of plaintiffs' contention.*—The above proposition appears to have been conceded by counsel in the *Walker Case* in the District Court (Rec. No. 615, p. 22); and although contested in the *Anchor Line Case* the point was not accorded serious attention (Rec. No. 639, pp. 50–56).

The argument appears to run: (1) That the purpose of the eighteenth amendment is to prohibit

the manufacture, sale, transportation, etc., of intoxicating liquor for beverage purposes *within the United States*; (2) that the prohibition act if construed to apply to the transshipment of liquor in and through the United States will prohibit the transportation and possession of liquor for beverage purposes *outside the United States*; (3) wherefore, the act is broader than the amendment and beyond the power of Congress to enact.

The fallacy of this argument, as well as of complainants' argument in reference to the construction of the act, consists in limiting the operation and effect of the eighteenth amendment to a purpose not expressed therein. As we have seen (*supra* p. 12), the eighteenth amendment prohibits absolutely the transportation of intoxicating liquors (1) "within the United States," (2) "for beverage purposes." This juxtaposition demonstrates that the words "within the United States" define the place where the forbidden act may not take place, and that they do not relate to or qualify the words "for beverage purposes."

But accepting, *arguendo*, the premise, the conclusion does not follow, because—

2. *Congress in legislating for the enforcement of the eighteenth amendment may provide all means reasonably necessary effectively to suppress the prohibited acts.*—It is the settled doctrine of this court (1) that Congress in legislating within its constitutional sphere for the suppression of a particular evil may provide all means reasonably necessary to effectuate

the legislative will; and (2) that where the means provided has some reasonable relation to the evil at which the legislation is aimed the court will not substitute its judgment for that of Congress as to the necessity or advisability of the means.

This proposition is sustained by a principle of constitutional construction announced in *McCulloch v. Maryland*, 4 Wheat. 316, 421, 423, and ever since adhered to. The principle was thus stated in *Powell v. Pennsylvania*, 127 U. S. 678, 685:

The power which the legislature has to promote the general welfare is very great, and the discretion which that department of the Government has, in the employment of means to that end, is very large. While both its power and its discretion must be so exercised as not to impair the fundamental rights of life, liberty, and property; and while, according to the principles upon which our institutions rest, "the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself"; yet "in many cases of mere administration the responsibility is purely political, no appeal lying except to the ultimate tribunal of the public judgment. . . ."

Applying the principle to that case it was held that the courts would not override the legislative judgment that the protection of the public health

required not merely that the manufacture of oleo-margarine be so regulated as to exclude noxious ingredients, but prohibited altogether; that the legislature had this choice of means.

In *Otis v. Parker*, 187 U. S. 606, 608, 609, it was held that in order to suppress gambling in corporate stocks the legislature may avoid all contracts for the sale of such stocks on margin, whether only a settlement of price differences or a *bona fide* acquisition of the stock is contemplated.

Similarly in *Public Clearing House v. Coyne*, 194 U. S. 497, it was held that in preventing the use of the postal service in aid of lotteries and fraudulent enterprises Congress is not confined to excluding matter relating to such enterprises but may prohibit the transmission or delivery of all matter sent by or addressed to persons participating therein.

A leading case on the subject is *Purity Extract Co. v. Lynch*, 226 U. S. 192, in which it was held that a State legislature, in order to make effective its prohibition of the use of malt liquor might include within the prohibition wholly innocuous beverages. Mr. Justice Hughes, speaking for the court, said (p. 201):

It is also well established that, when a State exerting its recognized authority undertakes to suppress what it is free to regard as a public evil, it may adopt such measures having reasonable relation to that end as it may deem necessary to make its action effective. It does not follow that because a

transaction separately considered is innocuous it may not be regarded as essential in the legislative judgment to accomplish a purpose within the admitted power of the Government.

That case was followed in *Ruppert v. Caffey*, 251 U. S. 264, in upholding the power of Congress, under the war power, to prohibit the manufacture of all malt or vinous liquors containing as much as one-half of one per centum of alcohol by volume, even though they be not in fact intoxicating.¹

In view of the instances cited, who will say that the prohibition of the possession or transportation within the United States of liquors for beverage purposes, even though intended for consumption outside the United States, has no reasonable relation to the prevention of the use of such liquors within the United States?

3. *Because of their noxious qualities all traffic in or dealing with intoxicating liquor may be absolutely suppressed.*—It can not be supposed that the power conferred by the eighteenth amendment on Congress and the States to suppress the use of intoxicating liquors is not as great as the power theretofore possessed by the States to legislate on the subject. Therefore, the many cases upholding the very drastic prohibition laws of the States are in point. It will suffice to quote from only one of these, *Crane v. Campbell*, 245 U. S. 304, 307-308, in which this

¹ See, also, *The Slaughter House Cases*, 16 Wall. 36; *Knoxville Iron Co. v. Harbison*, 183 U. S. 13; *Booth v. Illinois*, 184 U. S. 425; *Silz v. Hesterberg*, 211 U. S. 31; *Delaware, Lack. & West. R. R. Co. v. United States*, 231 U. S. 363, 370; *Houston v. St. Louis Packing Co.*, 249 U. S. 479; *Brougham v. Blanton*, 249 U. S. 495.

court upheld a statute of the State of Idaho punishing the possession of intoxicating liquor for personal use:

It must now be regarded as settled that on account of their well-known noxious qualities and the extraordinary evils shown by experience commonly to be consequent upon their use, a State has power absolutely to prohibit manufacture, gift, purchase, sale, or transportation of intoxicating liquors within its borders without violating the guarantees of the fourteenth amendment. * * *

As the State has the power above indicated to prohibit, it may adopt such measures as are reasonably appropriate or needful to render exercise of the power effective. * * * And, considering the notorious difficulties always attendant upon efforts to suppress traffic in liquors, we are unable to say that the challenged inhibition of their possession was arbitrary and unreasonable or without proper relation to the legitimate legislative purpose.

We further think it clearly follows from our numerous decisions upholding prohibition legislation that the right to hold intoxicating liquors for personal use is not one of those fundamental privileges of a citizen of the United States which no State may abridge. A contrary view would be incompatible with the undoubted power to prevent manufacture, gift, sale, purchase or transportation of such articles—the only feasible way of getting at them. An assured right of possession would necessarily imply some adequate method to obtain not subject to destruction at the will of the State.

III.

PLAINTIFFS HAVE NOT BY PROPER ALLEGATIONS BROUGHT THEMSELVES WITHIN ARTICLE XXIX OF THE TREATY WITH GREAT BRITAIN PROCLAIMED JULY 4, 1871; BUT IN ANY EVENT SAID ARTICLE HAS BEEN ABROGATED.

1. *Neither plaintiff has alleged facts bringing it within Article XXIX.*—Said article, as we have seen (*supra*, p. 13), provides that—

goods, wares, and merchandise arriving at the ports of New York, Boston, and Portland and any other ports of the United States which have been or may, from time to time be specially designated by the President of the United States and destined for Her Britannic Majesty's possessions in North America, may be entered at the proper customhouse, and conveyed in transit, without the payment of duties, through the territory of the United States;—

and that in like manner—

goods, wares, and merchandise may be conveyed in transit, without the payment of duties, from such possessions through the territory of the United States for export from the said ports of the United States. [Italics ours.]

In No. 615 Hiram Walker & Sons (Ltd.), alleges interference with two shipments, viz, one from Walkerville, Ontario, to the port of Detroit, and thence through the territory of the United States to customers in Mexico, and another from Walkerville to Detroit and from Detroit to New Orleans for export to Guatemala. Yet nowhere in its petition does the plaintiff allege that the ports at which the shipments

were to be exported were "specially designated by the President of the United States" in accordance with the provisions of the article.

Again, it is clear that the language of the article, providing that goods, wares, and merchandise may "be conveyed in transit" "through the territory of the United States," relates to the transportation of such goods from one port to another and not merely to transshipments in a single port as alleged by the Anchor Line in No. 639.

It is submitted, therefore, that neither plaintiff has set up any rights under the treaty.

2. *The abrogation of Article XXIX was effected by Act of Congress.*—Article XXIX as we have seen provides that it shall be in effect for the term of years mentioned in Article XXXIII (*supra*, p. 13).

Article XXXIII, reads as follows:

The foregoing Articles XVIII to XXV, inclusive, and Article XXX of this treaty shall take effect as soon as the laws required to carry them into operation shall have been passed by the Imperial Parliament of Great Britain, by the Parliament of Canada, and by the Legislature of Prince Edward Island on the one hand, and by the Congress of the United States on the other. Such assent having been given, the said articles shall remain in force for the period of ten years from the date at which they may come into operation; and further until the expiration of two years after either of the high contracting parties shall have given notice to the other of its wish to terminate the same; each of the high contracting

parties being at liberty to give such notice to the other at the end of the said period of ten years or at any time afterward.

Articles I to XVII, inclusive, provide for the settlement of the Alabama claims and for claims of British subjects against the United States; Articles XVIII to XXV, inclusive, and Article XXX relate to fisheries; Articles XXIX and XXXIII have been set out above and the remaining articles cover miscellaneous matters such as the use of waterways, arbitration of boundaries, etc.

On March 1, 1873, Congress passed an act entitled, "An act to carry into effect the provisions of the treaty between the United States and Great Britain signed in the city of Washington the eighth day of May, eighteen hundred and seventy-one, relating to fisheries."

Section 3 of this act, giving effect to Article XXIX of the treaty, is as follows:

That from the date of the President's proclamation authorized by the first section of this act, *and so long as the articles eighteenth to twenty-fifth, inclusive, and articles thirtieth of of said treaty, shall remain in force, according to the terms and conditions of article thirty-third of said treaty,* all goods, wares or merchandise arriving at the ports of New York, Boston, and Portland, and any other ports in the United States which have been, or may, from time to time, be, specially designated by the President of the United States, and destined for Her Britannic Majesty's possessions in

North America, may be entered at the proper customhouse and conveyed in transit, without the payment of duties, through the territory of the United States, under such rules, regulations, and conditions for the protection of the revenue as the Secretary of the Treasury may, from time to time, prescribe; and, under like rules, regulations, and conditions, goods, wares, or merchandise, may be conveyed in transit, without the payment of duties, from such possessions, through the territory of the United States, for export from the said ports of the United States. (17 Stat. 482.) [Italics ours.]

This section was incorporated in the Revised Statutes as section number 2866.

On March 3, 1883, Congress passed a joint resolution entitled, "Joint resolution providing for the termination of articles Numbered XVIII to XXV, inclusive, and Article Numbered XXX of the treaty between the United States of America and Her Britannic Majesty concluded at Washington May 8, 1871. (22 Stat. 641.)

The resolution provided for the giving of notice of the abrogation of the articles of the treaty named in the title, and no others. Section 3 contained the following provision:

And the act of Congress approved March 1, A. D. 1873, entitled * * * so far as it relates to the articles of said treaty so to be terminated, shall be and stand repealed and be of no force on and after the time of the expiration of said two years.

By proclamation of January 21, 1885, President Arthur gave notice that Articles XVIII to XXV, inclusive, and Articles XXX and XXXII will expire on July 1, 1885. (23 Stat. 841.)

As noted, the act of March 1, 1873, giving effect to the various provisions of the treaty, limits the operation of Article XXIX to the life of Articles XVIII to XXV and Article XXX, and constitutes a legislative interpretation of Article XXXIII as it relates to Article XXIX; if not this, it is a legislative limitation of the article which governs.

Section 3 of the act of 1873, giving effect to Article XXIX (Section 2866, R. S.), expired by self-limitation on the abrogation of Articles XVIII to XXV and XXX, and there is, therefore, no legislation in force to give effect to this Article.¹ The observations of this court in *Foster v. Neilson*, 2 Pet. 253, 314, are pertinent:

* * * Our Constitution declares a treaty to be the law of the land; it is, consequently, to be regarded by courts of justice as equivalent to an act of the legislature, whenever it operates of itself, without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engage to perform a particular act, the treaty addresses itself to the political, not the judicial, department, and the legislature must execute the contract before it can become a rule for the court.

3. *Presidents Cleveland and Harrison have declared Article XXIX terminated.*—President Cleveland, in

¹ See editorial note, *Compiled Statutes*, 1916, vol. 6, page 6667.

a message to Congress dated August 23, 1888, requesting legislative action conferring upon the Executive power to suspend by proclamation the operation of all laws and regulations permitting the transit of goods, wares, and merchandise in bond across or over the territory of the United States to or from Canada, as a retaliatory measure against grievances suffered by Americans at the hands of British subjects in Canada, reviewed the provisions of the treaty and legislation as to Article XXIX, and stated his opinion that this article terminated the 1st day of July, 1885.

The President said:

I am of opinion that the "term of years mentioned in Article XXXIII," referred to in Article XXIX as the limit of its duration, means the period during which Articles XVIII to XXV, inclusive, and Article XXX, commonly called the "fishery articles," should continue in force under the language of said Article XXXIII.

That the joint high commissioners who negotiated the treaty so understood and intended the phrase is certain, for in a statement containing an account of their negotiations, prepared under their supervision and approved by them, we find the following entry on the subject:

"The transit question was discussed, and it was agreed that any settlement that might be made should include a reciprocal arrangement in that respect for the period for which the fishery articles should be in force."

In addition to this very satisfactory evidence supporting this construction of the

language of Article XXIX it will be found that the law passed by Congress to carry the treaty into effect furnishes conclusive proof as to the correctness of such construction.

This law was passed March 1, 1873, and is entitled "An act to carry into effect the provisions of the treaty between the United States and Great Britain signed in the city of Washington the 8th day of May, 1871, relating to the fisheries." After providing in its first and second sections for putting in operation Articles XVIII to XXV, inclusive, and Article XXX of the treaty, the third section is devoted to Article XXIX, as follows: "Sec. 3. That from the date of the President's proclamation authorized by the first section of this act, and so long as the articles eighteenth to twenty-fifth, inclusive, and article thirtieth of said treaty shall remain in force according to the terms and conditions of article thirty-third of said treaty, all goods, wares, and merchandise, arriving," etc., etc., following in the remainder of the section the precise words of the stipulation on the part of the United States as contained in Article XXIX, which I have already fully quoted.

Here, then, is a distinct enactment of the Congress limiting the duration of this article of the treaty to the time that Articles XVIII to XXV, inclusive, and Article XXX should continue in force. That in fixing such limitation it but gave the meaning of the treaty itself is indicated by the fact that its purpose is declared to be to carry into effect the provisions of the treaty, and by the further fact that this

law appears to have been submitted before the promulgation of the treaty to certain members of the joint high commission representing both countries, and met with no objection or dissent.

After considering the effect of the act of March 1, 1873, the President continued:

There appearing to be no conflict or inconsistency between the treaty and the act of Congress last cited, it is not necessary to invoke the well-settled principle that in case of such conflict the statute governs the question.

In any event, whether the law of 1873 construes the treaty or governs it, section 29 of such treaty, I have no doubt, terminated with the proceedings taken by our Government to terminate Articles XVIII to XXV, inclusive, and Article XXX of the treaty.

* * * * *

If by any language used in the joint resolution it was intended to relieve section 3 of the act of 1873, embodying Article XXIX of the treaty from its own limitations, or to save the article itself, I am entirely satisfied that the intention miscarried. (*Messages and Papers of Presidents*, Richardson, vol. 8, pp. 620, 624, 625.)

President Harrison, in a message to Congress under date of February 2, 1893, in response to a resolution of the House requesting information as to regulations concerning the transportation of imported merchandise in bond, etc., took the same view as to Article XXIX as his predecessor.

After reviewing the provisions of the treaty, and the legislation under it, and quoting from the message of President Cleveland, cited above, President Harrison said:

Section 3 of the law of 1873, which I have quoted, however, contains a legislative construction of Article XXIX of the treaty in the limitation that the provisions therein contained as to the transit of goods could continue in force only so long as Articles XVIII to XXV, inclusive, and XXX of the treaty should remain in force.

* * * * *

* * * The enactment of section 3 of the act of 1873 was a clear declaration that legislation was necessary to put Article XXIX of the treaty in operation, and that under the treaty our obligation to provide such legislation terminated whenever Articles XVIII to XXV and XXX should be abrogated. The legislation was accepted by Great Britain as a compliance with our obligations under the treaty. No objection was made that our statute treated Article XXIX as having force only so long as the other articles named were in force.

President Harrison then considered the opinions which had been expressed by Secretary Bayard and Senator Edmunds to the effect that Article XXIX was still in force and disposed of them as follows:

An examination of the debates at the time of the passage of this joint resolution (Mar. 3, 1883, *supra*, p. 39) very clearly shows that Congress made an attempt to save Article

XXIX of the treaty and section 3 of the act of 1873. In the Senate on the 21st of February, 1883, the resolution being under consideration, several Senators, including Mr. Edmunds, the chairman of the Judiciary Committee, expressed the opinion that Article XXIX would not be affected by the abrogation of Articles XVIII to XXV and XXX, and an amendment was made to the resolution with a view to leave section 3 of the act of 1873 in force. The same view was taken in the debates in the House.

The subject again came before Congress in connection with the consideration of a bill (S. 3173) to "authorize the President of the United States to protect and defend the rights of American fishing vessels, American fishermen, American trading and other vessels in certain cases, and for other purposes."

In the course of the debate upon the bill in the Senate January 24, 1887, and in the House February 23 following, the prevailing opinion was, though not without some dissent, that Article XXIX was still in force.

On the 6th of July, 1887, in response to an inquiry by the Secretary of the Treasury, Mr. Bayard wrote a letter, a copy of which accompanies this message, in which he expresses the opinion that Article XXIX of the treaty was unaffected by the abrogation of the fisheries articles and was still in force. In August, 1888, however, Mr. Cleveland, in a message to Congress, expresses his opinion of the question in the following language:

(Quoting the language set forth on p. 43,
supra.)

* * * *

I am inclined to think that, using the aids which the protocol and the nearly contemporaneous legislation by Congress in the act of 1873 furnish in construing the treaty, the better opinion is that Article XXIX in the treaty is no longer operative. The enactment of section 3 of the act of 1873 was a clear declaration that legislation was necessary to put Article XXIX of the treaty into operation, and that under the treaty our obligation to provide such legislation terminated whenever Articles XVIII to XXV and XXX should be abrogated. This legislation was accepted by Great Britain as a compliance with our obligations under the treaty. No objection was made that our statute treated Article XXIX as having force only so long as the other articles named were in force.

The conclusions of the President, so far as they relate to the subject now under consideration, were as follows:

First. That Article XXIX of the treaty of Washington has been abrogated.

Second. That even if this article were in force there is no law in force to execute it. (*Messages and Papers of the Presidents*, Richardson, vol. 9, p. 335, 339, 340, 345.)

The President transmitted with his message to Congress an opinion of Attorney General Miller also holding that Article XXIX was abrogated. (*Opinions of the Attorney General*, vol. 20, p. 388.)

As regards the suggestion that the Treasury Department has treated Article XXIX as still in force after these expressions of the Presidents, we reply: The Article is not self-executing but is dependent on enabling legislation. The Treasury Department, therefore, can have no concern with the Article but only with legislation passed to carry it into effect. As we have seen, Section 3 of the Act of March 1, 1873, giving effect to Article XXIX, is no longer in force. However, Section 3005, R. S., providing for "in transit" shipments, has been continuously on the books since before the negotiation of the treaty. A possible explanation is that existing Treasury Regulations, erroneously supposed to be based on the treaty, are in reality based on this independent legislation.

4. The question being essentially political and not judicial, the legislative and executive interpretations should be followed.—In *Taylor v. Morton*, 2 Curtis, 454, Mr. Justice Curtis, on circuit, said:

Is it a judicial question, whether a treaty with a foreign sovereign has been violated by him; whether the consideration of a particular stipulation in a treaty has been voluntarily withdrawn by one party, so that it is no longer obligatory on the other; whether the views and acts of a foreign sovereign, manifested through his representative, have given just occasion to the political departments of our Government to withhold the execution of a promise contained in a treaty, so to act in direct contravention of such promise? I apprehend not.

In *Foster v. Neilson*, 2 Pet., 253, at page 306, Chief Justice Marshall said:

The judiciary is not that department of the Government to which the assertion of its interests against foreign powers is confided; and its duty commonly is to decide upon individual rights, according to those principles which the political departments of the Nation have established. If the course of the Nation has been a plain one, its courts would hesitate to pronounce it erroneous. We think, then, however individual judges might construe the treaty of St. Ildefonso, it is the province of the court to conform its decisions to the will of the legislature, if that will has been clearly expressed.

In *Barker v. Harvey*, 181 U. S. 481, 488, Mr. Justice Brewer said:

This court, in a class of cases like the present, has no power to set itself up as the instrumentality for enforcing the provisions of a treaty with a foreign nation which the Government of the United States as a sovereign power chooses to disregard.

In *Thomas v. Gay*, 169 U. S. 264, 271, Mr. Justice Shiras said:

It is well settled that an act of Congress supersedes a prior treaty, and that any questions that may arise are beyond the sphere of judicial cognizance and must be met by the political department of the Government.

And see also: *Head Money Cases*, 112 U. S. 580; *Whitney v. Robertson*, 124 U. S. 190; *Chinese Exclusion*

Cases, 130 U. S. 581; Botelier v. Dominguez, 130 U. S. 238; United States v. Lee Yen Tai, 185 U. S. 213.

5. *If Article XXIX was not abrogated in the manner described, then so far as it relates to shipments of liquor it was abrogated by the national prohibition act.*—The conflict between Article XXIX of the treaty, as applied to the shipment of intoxicating liquor for beverage purposes, and section 3, Title II, of the national prohibition act, is plain and irreconcilable.

(A) As applied to such shipments Article XXIX provides, in effect, that intoxicating liquor for beverage purposes may be conveyed in transit through the United States to or from English possessions in North America; whereas

(B) Section 3, Title II, of the Volstead Act provides that “no person shall * * * manufacture, sell, barter, transport, import, export, deliver, furnish, or possess any intoxicating liquor except as authorized by this act.”

It is, of course, well settled that in all cases of conflict between a treaty and a subsequent act of Congress, the latter will control. *Rainey v. United States, 232 U. S. 310; Sanchez v. United States, 216 U. S. 167; Barker v. Harvey, 181 U. S. 481; Ward v. Race Horse, 163 U. S. 504; Lenn Moon Sing v. United States, 158 U. S. 538; Fong Yue Ting v. United States, 149 U. S. 698; Horner v. United States, 143 U. S. 570; Botelier v. Dominguez, 130 U. S. 238; Chae Chan Ping v. United States, 130 U. S. 581; Whitney v. Robertson, 124 U. S. 190.*

It follows, therefore, that Article XXIX, even if in force at the time the Volstead Act went into effect, was necessarily repealed by the latter in so far as it applied to the possession and transportation of liquor.

IV.

SECTION 3005 OF THE REVISED STATUTES CONFERRED NO AFFIRMATIVE RIGHTS WITH RESPECT TO THE TRANSHIPMENT OF MERCHANDISE: ASSUMING THAT IT DID, IT WAS SUPERSEDED BY THE NATIONAL PROHIBITION ACT SO FAR AS SHIPMENTS OF LIQUOR ARE CONCERNED.

1. *Section 3005 conferred no affirmative rights.*—This provision was originally enacted as section 5 of the act approved July 28, 1866 (c. 298, 14 Stat. 328). That act was entitled "An act to protect the revenue, and for other purposes," and was purely a revenue measure. It provided, among other things, the customs duties to be collected on importations of cigars, cigarettes, distilled spirits, cotton, salt, etc., and contained several measures for the protection of the revenue. Section 5 read as follows:

That from and after the passage of this act, all goods, wares, or merchandise arriving at the ports of New York, Boston, and Portland, or any other port of the United States which may be specially designated by the Secretary of the Treasury, and destined for places in the adjacent British Provinces, or arriving at the port of Point Isabel, Texas, or any other port of the United States which may be specially designated by the Secretary of the Treasury, and destined for places in the Republic of Mexico, may be entered at the customhouse, and conveyed, in transit, through

the territory of the United States, without the payment of duties, under such rules, regulations, and conditions for the protection of the revenue as the Secretary of the Treasury may prescribe.

The provision was carried into the Revised Statutes in substantially the same language. By act of February 27, 1877 (c. 69, 19 Stat. 240), entitled "An act to perfect the revision of the statutes of the United States and of the statutes relating to the District of Columbia," section 3005, R. S., was amended by striking out the words "Point Isabel" and inserting the word "Brownsville." By act of May 21, 1900 (c. 487, 31 Stat. 181), entitled "An act to amend section three thousand and five of the Revised Statutes of the United States," the provision was amended to its present form, viz:

All merchandise arriving at any port of the United States destined for any foreign country may be entered at the customhouse, and conveyed, in transit, through the territory of the United States, without the payment of duties, under such regulations as to examination and transportation as the Secretary of the Treasury may prescribe.

The reason for the last amendment is stated in the report of the Committee on Ways and Means of the House of Representatives, as follows:

The changing conditions of commerce and the establishment of new transportation routes demand the enlargement of the privileges

given by this statute to all foreign merchandise arriving for transit through the United States, whether to or from Canada, Mexico, or any other foreign country. The proposed change will tend to facilitate the carriage of foreign merchandise in bond through the United States by our own transportation companies, and will not in any way endanger the revenues * * *.

This section, as it now stands, provides only for the carrying and transit of merchandise from foreign countries destined to either some place in Canada or in Mexico. At the time the section was passed (July 28, 1866) this answered all the requirements of commerce. Since that time a large trade has grown up with oriental countries, much of which seeks transportation through the United States.

We are losing much of the benefit of this transportation because we can not pass these goods through the country in bond. This amendment is offered in order to give a fair share of this trade to our transportation.
* * * (33 Cong. Rec. 1736.)

Clearly, therefore, section 3005, R. S., is purely a revenue measure enacted in the interest of American transportation companies and confers no affirmative right to transport merchandise into and through the United States. It merely exempts from payment of customs duties shipments into and through the United States which, under the tariff laws, would otherwise be dutiable as imports.

Title XXXIV of the Revised Statutes, in which section 3005 is contained, is entitled "Collection of Duties upon Imports." Section 2766, R. S., a part of the same title, provides:

The word "merchandise," as used in this title, may include goods, wares, and chattels of every description *capable of being imported.* (Italics ours.)

Therefore, section 3005 has no possible application to the present cases, since intoxicating liquor may not be imported into the United States and is not "goods," "wares," or "merchandise" within the meaning of that section and is not subject to duty. On this point Judge Mayer said:

In the cases at bar, the liquor was not subject to duty. It could not be imported. The introduction into this country from some foreign port of liquor for beverage purposes has no relation to revenues. Such liquor could not be lawfully introduced into this country because of the change in the national policy. (Rec. No. 639, p. 55.)

2. Assuming that the section did confer the right claimed, it was repealed by the national prohibition act so far as shipments of liquor are concerned.—It is true that repeals by implication are not favored, but it is further true that when a later statute is clearly inconsistent with a prior one, the latter must be deemed to have been repealed to the extent of such inconsistency. That section 3005, R. S., and section 3, Title II, of the national prohibition act are hopelessly antagonistic as regards the transportation of

liquor will appear from a brief comparison of their respective provisions:

Section 3005 R. S.

All merchandise arriving at any port of the United States destined for any foreign country may be entered at the customhouse, and conveyed in transit through the territory of the United States without the payment of duties under such regulations as to examination and transportation as the Secretary of the Treasury may prescribe.

Section 3, Title II, of the national prohibition act.

*No person shall on or after the date when the eighteenth amendment to the Constitution of the United States goes into effect manufacture, sell, barter, transport, import, export, deliver, furnish, or possess any intoxicating liquor except as authorized in this act. * * **

Ascribing to section 3005, R. S., the effect contended for by opposing counsel, viz, that it conferred an affirmative right to transport merchandise through the United States, we have the following situation: The old law, as it applies to intoxicating liquors, says that they may be "conveyed" under regulations governing "transportation"; while the new law absolutely prohibits such "transportation" and even "possession." It is difficult to conceive of two more flatly contradictory provisions.

3. *The prohibition act supersedes all licensing and permissive statutes.*—The eighteenth amendment and the Volstead Act being absolute prohibitions on the manufacture, sale, transportation, etc., of intoxicating liquor, it is not within the power of Congress to license or permit the doing of any of those acts, and all licensing and permissive statutes in force on the effective date of the amendment and act were by

necessary implication repealed. In the *National Prohibition cases* (253 U. S. 350, 386-387) this court laid down the following propositions:

6. The first section of the amendment—the one embodying the prohibition—is operative throughout the entire territorial limits of the United States, binds all legislative bodies, courts, public officers, and individuals within those limits, and of its own force invalidates every legislative act—whether by Congress, by a State legislature, or by a Territorial assembly—which authorizes or sanctions what the section prohibits.

7. The second section of the amendment—the one declaring “The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation”—does not enable Congress or the several States to defeat or thwart the prohibition, but only to enforce it by appropriate means.

In *United States v. Yuginovich* (No. 523) decided June 1, 1921, this court had before it an indictment in four counts, based on the revenue provisions of the Revised Statutes and charging (a) defrauding the United States of the tax on distilled spirits; (b) failing to display in a distillery the words “Registered distillery”; (c) operating a distillery without giving the required bond; (d) making mash fit for distillation in a building not a registered distillery. The acts charged having been committed after the effective date of the eighteenth amendment and the Volstead Act, a demurrer and a motion to quash were filed on

the ground that the statutes under which the indictment was found had been repealed.

This court in affirming the action of the District Court in quashing the indictment, said:

These statutes have long been part of the Federal internal revenue legislation, and were passed under the authority of the taxing power conferred upon Congress by the Constitution of the United States. At the time of their enactment it was legal, so far as the Federal Government was concerned, to manufacture and sell ardent spirits for beverage purposes. The Government derived large revenue from taxing the business, which it sought to realize and protect by the system of laws of which the sections in question were a part. This policy was radically changed by the adoption of the eighteenth amendment to the Federal Constitution, and the enactment of legislation to make the amendment effective. The eighteenth amendment in comprehensive and clear language prohibits the manufacture or sale of intoxicating liquors in the United States for beverage purposes, and confers upon Congress the power to enforce the amendment by appropriate legislation. To this end, Congress passed a national prohibition law known as the Volstead Act (41 Stat. 305). It is a comprehensive statute intended to prevent the manufacture and sale of intoxicating liquors for beverage purposes.

* * * * *

Section 35 in its first sentence repeals all prior acts to the extent of their inconsistency

with the national prohibition act, to that extent and no more.

* * * * *

It is, of course, settled that repeals by implication are not favored. It is equally well settled that a later statute repeals former ones when clearly inconsistent with the earlier enactments. (United States v. Tynen, 11 Wall. 88.) In construing penal statutes, it is the rule that later enactments repeal former ones practically covering the same acts but fixing a lesser penalty. The concluding phrase of section 35 by itself considered is strongly indicative of an intention to retain the old laws. But this section must be interpreted in view of the constitutional provision contained in the eighteenth amendment and in view of the provisions of the Volstead Act intended to make that amendment effective.

Having in mind these principles and considering now the first count of the indictment charging an attempt to defraud and actually defrauding the Government of the revenue tax, we do not believe that the general language used at the close of section 35 evidences the intention of Congress to inflict for such an offense the punishment provided in section 3257 with the resulting forfeiture, fine, and imprisonment, and at the same time to authorize prosecution and punishment under section 35 enacting lesser and special penalties for failing to pay such taxes by imposing a tax in double the amount provided by law, with an additional penalty of \$500 on retailers and \$1,000 on manufacturers. Moreover, the con-

cluding words of the first paragraph of section 35, as to all the offenses charged, must be read in the light of established legal principles governing the interpretation of statutes, and in view of the provisions of the Volstead Act itself making it unlawful to possess intoxicating liquor for beverage purposes, or property designed for the manufacture of such liquor, and providing for its destruction. We agree with the court below that while Congress manifested an intention to tax liquors illegally as well as those legally produced, which was within its constitutional power, it did not intend to preserve the old penalties prescribed in section 3257 in addition to the specific provision for punishment made in the Volstead Act.

We have less difficulty with the other sections of the prior revenue legislation under which the charges, already set forth, are made. We think it was not intended to keep on foot the requirement as to displaying the words: "Registered distillery" in a place which could no longer be lawfully conducted; nor to require a bond for the control of such production; nor to penalize the making of mash in a distillery which could not be authorized by law. [Italics ours.]

See also *United States v. Two Thousand Cases of Whiskey*, 277 Fed. 410; *United States v. Stafoff*, 268 Fed. 417; *Ex parte Crookshank*, 269 Fed. 980.

There is nothing in *Vigliotti v. Pennsylvania*, No. 530, decided April 10, 1922, inconsistent with this proposition. In that case the court, in accordance with the general rule, followed the Pennsylvania

courts' construction of the State statute as being a prohibitory and not a licensing measure, and held that, *as so construed*, it constituted "appropriate legislation" for the enforcement of the eighteenth amendment.

4. *The transshipments involved in case No. 639 are not within the section.*—Appellant Anchor Line has asserted rights under section 3005, R. S. (Rec. 15, 19, 20), but it is clear that the facts alleged do not bring appellant within that section. The section in terms provides that merchandise arriving at any port of the United States may be "conveyed," "*in transit*," "*through the territory of the United States*," without the payment of duties, etc. The object of the section was to permit such in transit shipments for the benefit of American transportation companies (*supra*, p. 51). It clearly does not apply to the mere transshipment of merchandise from one ship to another in a single port (compare 27 Op. A. G. 440).

CONCLUSION.

It is respectfully submitted that the decree in No. 615 should be reversed and the cause remanded with instructions to dismiss the bill, and that the decree in No. 639 should be affirmed.

GUY D. GOFF,
Assistant to the Attorney General.

ABRAM F. MYERS,
Special Assistant to the Attorney General.

APRIL 17, 1922.





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IN THE SUPREME COURT OF THE UNITED STATES.

JOHN A. GROGAN, Collector of Internal
Revenue, et. al.,
Defendants and Appellants,
v.
HIRAM WALKER & SONS, LTD.,
Plaintiff and Appellee.

615

MEMORANDUM FOR APPELLEE.

Alfred Lucking,
Counsel for Appellee.

IN THE SUPREME COURT OF THE UNITED STATES.

JOHN A. GROGAN, Collector of Internal
Revenue, et. al.,
Defendants and Appellants,
v.
HIRAM WALKER & SONS, LTD.,
Plaintiff and Appellee.

MEMORANDUM.

On the hearing the question was asked from the bench:
"Why should exportation of liquor from the United States
be prohibited and still the practice of 'transit in bond' be
permitted?"

Two answers are suggested:

I. In the words of Judge Tuttle in his opinion (Rec., pp.
24, 25):

"It is urged by the government that the prohibition in the statute against the exportation of intoxicating liquor from the United States negatives an intention to confine its application to the use of such liquor within the United States. This argument overlooks the close relation between manufacture and exportation and the incentive to engage in the former which is furnished by the right to engage in the latter; and it was doubtless considered, and not without reason, that to forbid the exportation of intoxicating liquor from, would tend to make easier the

enforcement of the prohibition against its manufacture and possession in, the United States. It can not, however, be said that such a relation exists between the trans-shipments in question and the prevention of the use of intoxicating liquor as a beverage within the United States. To hold otherwise would be in effect to ignore the efficacy and effect of the protection afforded such trans-shipment by the United States customs officers and other officials under whose supervision they are conveyed in transit through the United States."

II. Another and to my mind a compelling reason is:

When our government forbids the exportation of liquors from the United States, *it is regulating and controlling the conduct of our own citizens—it is forbidding the traffic on the part of our citizens.* This is not at all the case in "conveyance in transit through the United States," which is simply permitting the British to conduct *their* business in foreign countries as in the past. We are simply extending ordinary international comity, in sending across our territory, in the most convenient way, their merchandise, without hurt to ourselves—and which practice is reciprocated in kind, in much larger measure. The commerce in question is legitimate under their laws and customs, which we do not seek or wish to control or regulate.

Respectfully submitted,

Alfred Lucking,
Counsel for Appellee.

Supreme Court of the United States

OCTOBER TERM, 1881.

NOTICE.

**THE ANCHOR LINE (HENDERSON & BROTHERS) LTD.
Complainants,**

against

**GEORGE W. ALDRIDGE, COLLECTOR OF CUSTOMS
FOR THE PORT OF NEW YORK.**

Defendant-Respondent.

**APPEAL FROM THE BOARD LOOKING UPON THE UNITED STATES
THE Southern District of New York.**

BRIEF FOR APPELLANT

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Supreme Court of the United States

OCTOBER TERM, 1921.

THE ANCHOR LINE (HENDERSON
BROTHERS), LTD.,

Complainant-Appellant,

against

GEORGE W. ALDRIDGE, COLLECTOR
OF CUSTOMS FOR THE PORT OF
NEW YORK.

Defendant-Respondent.

No. 639.

**Appeal from the District Court of the
United States for the Southern Dis-
trict of New York.**

Brief for Appellant.

This appeal has been taken to review a final decree in favor of the defendant, entered October 31, 1921, dismissing the Bill of Complaint herein. (R. 56.)

This action was tried on September 1st, 1921, before Honorable Julius M. Mayer, sitting in equity without a jury, on the motion of the plaintiff on the Amended Bill of Complaint and Answer for a decree for the relief demanded in the complaint. (R. 49.)

The opinion of the Trial Judge appears R. 50-56.

The facts set forth in the Amended Bill and Answer are not disputed and are as follows:

The complainant, a British corporation, contracted with Gilmour, Thompson & Company, of Glasgow, Scotland, to transport five cases of whiskey from Glasgow to Hamilton, Bermuda, there to be delivered to Burrows & Company, agents of Gilmour, Thompson & Company. These cases were shipped on complainant's S.S. "Cameronia," which sailed from Glasgow July 17, 1921, and arrived at the Port of New York on July 27th. (R. 18.)

These cases were to be transshipped in the Port of New York from the "Cameronia" to a vessel of another British corporation, the Quebec Line, running from New York to Bermuda. Both the appellant's vessels and the vessels of the Quebec Line are British steamships of British registry and flying the British flag, and Bermuda is a British possession. (R. 18.)

The cases of whiskey are covered by a through bill of lading from Glasgow to Burrows & Company in Bermuda. A bill of lading also accompanies the shipment to New York calling for the delivery of the cases at the Port of New York to the Quebec Line. (R. 18.)

The respondent threatened to seize these cases under instructions received from the Treasury Department, dated July 8, 1921, which advised him to refuse transportation and exportation entries for all intoxicating liquors not covered by a prohibition permit. (R. 18). A prohibition permit is issued for liquor to be used for other than beverage purposes. These instructions stated that this direction was given pursuant to an opinion of the Attorney General.

The opinion thus referred to is one issued under date of February 4, 1921. A copy of it is annexed to this brief as Appendix A.

By order of the District Court, the marshal took possession of these five cases of whiskey on arrival of the "Cameronia" and holds them pending the decision of this case. (R. 49.)

The appellant for many years as a part of its business has carried liquors from Glasgow to the Port of New York, where such liquors have been transshipped to destinations in the British possessions in America and to foreign ports in the Gulf of Mexico and South America. (R. 15.)

This carriage by the appellant of liquors, to be transshipped in New York, has yielded a large revenue to the appellant and has continued since the adoption of the National Prohibition Act. (R. 15.) Figures stated in the bill show that for the last three years the freight earned on this carriage was £9644. (R. 21-22.)

If this carriage is now prevented by the stoppage of these "intransit" shipments, liquor will be sent from Great Britain to the British West Indies and South American countries by other routes and the appellant will suffer a severe loss, for which it has no adequate remedy at law. And if such shipments should continue to be made for transshipment in the Port of New York, there will be seizures here which will involve a multiplicity of suits.

The Amended Bill of Complaint prays that the defendant be enjoined and restrained from enforcing against the complainant any of the penalties provided by the National Prohibition Act on the ground that transshipping liquors in a port of the United States under the provisions of

Section 3005 of the Revised Statutes, although shipped from and destined to foreign countries, is contrary to law, and that the defendant be further enjoined from refusing to issue to the complainant permits for such transshipment.

Appellant contends that the Trial Court was in error in dismissing the Bill of Complaint, and that the Secretary of the Treasury exceeded his authority in directing the defendant to stop transshipments of liquor. Appellant accordingly presents the shipment of these five cases from Glasgow to Bermuda as a test case.

The National Prohibition Act, adopted October 28, 1919, provides (Title II, Section 3) as follows:

"No person shall on or after the date when the eighteenth amendment to the constitution of the United States goes into effect, manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor except as authorized in this Act, and all the provisions of this Act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented."

The question here presented is whether the above provision prohibits this transshipment.

Specification of Errors Relied Upon.

The appellant claims that the District Court erred:

- (1) In holding that Section 3005 of the Revised Statutes has been repealed by the Act of Congress of October 28, 1919, known as the National Prohibition Act (R. 58).

(2) In holding that Section 3005 of the Revised Statutes which relates to the transshipment of merchandise in bond does not apply to intoxicating liquors for beverage purposes, although they are to be used without the United States, and that the National Prohibition Act prohibits "in transit" shipments of liquor for beverage purposes touching at ports of or moving through the United States though the same originate in and are destined to foreign countries (R. 58).

(3) In interpreting the National Prohibition Act so as to render said act unconstitutional and void (R. 59).

(4) In failing to hold that Congress was without power under the Eighteenth Amendment to the Constitution of the United States to prohibit the transshipment of liquor in ports of the United States or moving through the United States when the same originate in and are destined to foreign countries (R. 59).

(5) In holding that the Eighteenth Amendment to the Constitution of the United States prohibits the transshipment in ports of the United States of shipments of wines and intoxicating liquors originating in and destined to foreign countries (R. 59).

(6) In holding that Title II of the Act of Congress of October 28th, 1919, known as the National Prohibition Act, prohibits the transshipment of liquor for beverage purposes touching at ports of the United States, though the same originate in and are destined to foreign countries (R. 59).

(7) In failing to hold that transshipment in ports of the United States of shipments of wines and intoxicating liquors originating in and destined to a foreign country is permitted by the treaties between the United States and Great Britain, particularly the treaty of May 8th, 1871, ratified June 17th, 1871, and proclaimed July 4th, 1871, and particularly Article XXIX thereof (R. 59).

The contention of the appellant here is (1) that it was not the intention of Congress to have the National Prohibition Act apply to these transshipments (Points I to XI inclusive): (2) that it was not the intention of Congress in passing the National Prohibition Act to revoke Article XXIX of the Treaty of Washington which permits these transshipments (Point XII).

POINT I.

The Eighteenth Amendment and the National Prohibition Act do not purport to apply to the use of intoxicating liquor outside of the United States.

It is claimed by the Government that Section 3 of Title II of the Prohibition Act applies to the transshipment here involved. That section reads as follows:

“Sec. 3. No person shall on or after the date when the eighteenth amendment to the Constitution of the United States goes into effect, manufacture, sell, barter, transport,

import, export, deliver, furnish or possess any intoxicating liquor except as authorized in this Act, and all the provisions of this Act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented."

The general rule of construction requires that this clause be read in its entirety, and as so read the various acts which are prohibited—that is, manufacturing, selling, bartering, transporting, importing, exporting, etc.—are each prohibited "to the end that the use of intoxicating liquor as a beverage may be prevented."

If we then inquire where this is to be prevented, the answer appears in the Eighteenth Amendment, which reads:

"Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from *the United States and all territory subject to the jurisdiction thereof* for beverage purposes is hereby prohibited. (Italics ours.)

It thus expressly appears from the amendment that it is to prevent the use of intoxicating liquors as a beverage only within the United States and territory subject to the jurisdiction thereof.

The liquor to be transshipped in this case was to be used in Bermuda and therefore the Prohibition Act does not apply to this transshipment.

POINT II.

An intention ought not to be attributed to Congress to interfere with the use of liquor as a beverage outside of United States territory.

The National Prohibition Act was aimed to prevent the use of alcoholic liquor as a beverage in the United States and territory subject to the jurisdiction thereof and it would seem to be stating a self-evident proposition to say that an Act of Congress intended to regulate the habits of the people was intended to apply where Congress had jurisdiction and not where Congress did not have jurisdiction.

In *American Banana Co. v. United Fruit Co.* (213 U. S. 347), this subject was discussed and, after considering the rule as to the territorial application of the statutes, the Court said,—Mr. Justice Holmes writing, (page 357):

“The foregoing considerations would lead in case of doubt to a construction of any statute as intended to be confined in its operation and effect to the territorial limits over which the law-maker has general and legitimate power. ‘All legislation is *prima facie* territorial.’ *Ex parte Blain*, *In re Sawers*, 12 Ch. Div. 522, 528; *State v. Carter*, 27 N. J. (3 Dutcher) 499; *People v. Merrill*, 2 Parker, Crim. Rep. 590, 596. Words having universal scope, such as ‘Every contract in restraint of trade,’ ‘Every person who shall monopolize,’ etc., will be taken as a matter of course to mean only every one subject to such legisla-

tion, not all that the legislator subsequently may be able to catch. * * *,

The reluctance of American Courts to apply local statutes so as to interfere with business arrangements which were legal in the jurisdiction where the business originated is shown in *Milliken v. Pratt*, 125 Mass. 374, where a Massachusetts Court enforced a guaranty made by a married woman living in Massachusetts, although the law of Massachusetts did not allow her to make such contract, the reason for this action being that the guarantee was delivered and acted upon in Maine where married women were not under such disabilities.

POINT III.

Where Congress has intended to prevent the transshipment in American ports of merchandise moving from one foreign country to another it has expressly provided to that effect.

Congress is presumed to have been familiar with the history of the legislation in regard to transshipment of smoking opium, and the history of the passage of those acts is material in determining the intention of Congress in the instant case.

Section 1 of the Act regulating the importation of opium (35 Stat. L. 614; 38 Stat. L. 275-276) made it unlawful "to import into the United States" opium, but contained a proviso permitting the importation of opium other than smoking opium for medicinal purposes only.

Section 2 provided for a penalty "if any person shall fraudulently or knowingly *import or bring into* the United States" any opium contrary to law. (Italics ours.)

Section 4 provided that any person subject to the jurisdiction of the United States who should receive or "*have in his possession, or conceal on board of or transport* on any foreign or domestic vessel * * * destined to or bound from the United States or any possession thereof, any smoking opium," should be subject to a penalty. (Italics ours.)

Attorney General Wickersham, in construing these sections of the act regulating the importation of opium, held that the bringing of smoking opium into a United States port on one vessel for immediate carriage abroad by another vessel was not legally an "importation" and that such transshipment could lawfully be made. (27 Opinions of Attorneys General, 44.) And Congress considered it necessary to pass an act expressly prohibiting the transshipment of smoking opium as follows:

"Sec. 5. (*Admission for transportation to another country prohibited.*) That no smoking opium or opium prepared for smoking shall be admitted into the United States, or into any territory under the control or jurisdiction thereof, for transportation to another country, nor shall opium be transferred or transshipped from one vessel to another vessel within any waters of the United States for immediate exportation or any other purpose. (38 Stat. L. 276.)"

The situation when the Prohibition Act came before Congress was therefore this:

The Attorney General of the United States had ruled that an act which prohibited the importation, exportation and transportation of smoking opium did not prevent the transshipment of smoking opium from one vessel to another in ports of the United States.

Congress having thus been advised by the Attorney General that the words "import," "or bring into," "have in his possession" or "transport," did not prevent transshipment, adopted that construction and to meet this situation added Section 5 to prevent the transshipment of smoking opium. Therefore in using the words "import," "export" and "transport" in the Prohibition Act, Congress cannot have intended to prohibit the transshipment of liquor.

When the Prohibition Act was drafted it is most natural that the Act prohibiting the importation of opium for any purpose, except medicinal purposes, should have been referred to, for the provisions in regard to medicinal use have a striking similarity, and the acts forbidden, namely, "import," "bring into," "have in one's possession," or "transport," are practically identical. Anyone comparing the two Acts would have seen Section 5 of the opium Act and would have included a similar provision in the Prohibition Act if it had been intended to prevent the transshipment of liquor. Congress having left out such a provision showed an intention not to prevent transshipment.

It is claimed by the Government that the words "transport," "import" or "export" in Section 3 of Title II of the Prohibition Act apply to this

transshipment and this claim of the Government makes it necessary to consider the question whether there ought here to be a literal interpretation of these words or an interpretation which follows the intention of Congress.

POINT IV.

"A thing may be within the letter of the statute and yet not within the statute because not within its spirit nor within the intention of its makers."

This rule is so familiar as to need little comment.

In a case which was conceded by the Court to come directly within the letter of the Contract Labor Law, the law was held not to apply because the person under contract was a clergyman. The caption of this point is quoted from the opinion in that case. *Holy Trinity Church v. United States*, 143 U. S. 457, 458, 459.

In a case which came directly under the provisions of a Chinese Exclusion Act, it was held that the law did not apply because the person in question had previously lived in the United States. *Lau v. United States*, 144 U. S. 47, 61.

In a case which came expressly under the letter of an Immigration Act punishing those who allow aliens to land, except as directed by Immigration officials, it was held that the Act did not apply because the alien landed was a seaman. *Taylor v. United States*, 207 U. S. 120.

There was nothing in the three statutes construed respectively in the three cases cited above which referred to a clergyman in the first case, to

former residents in the United States in the second, or to seamen in the third. It was the Court, in each case, which, in carrying out the intent of Congress, declined to apply those acts to cases which could not reasonably be supposed to have been in the mind of Congress when the various Acts were framed. This was effective cooperation between the Legislative and Judicial Departments in promoting intelligent government.

POINT V.

The transshipment here involved is not "transportation" within the prohibition of the Eighteenth Amendment or of the Prohibition Act.

In the case of *United States v. Gudger*, 249 U. S. 373, this Court considered the language of the Reed Amendment to the Post Office Appropriation Act of March 3rd, 1917, (39 Stat. 1058-1069). The amendment provided:

"• • • Whoever shall order, purchase, or cause intoxicating liquors to be *transported in interstate commerce*, except for scientific, sacramental, medicinal, and mechanical purposes, *into any State or Territory* the laws of which State or Territory prohibit the manufacture or sale therein of intoxicating liquors for beverage purposes shall be punished as aforesaid: Provided, That nothing herein shall authorize the shipment of liquor into any State contrary to the laws of such State."

(Italics ours.)

The defendant was a passenger on a railroad train from Baltimore, Maryland, to Asheville, North Carolina, and while the train was temporarily stopped at the station at Lynchburg, Virginia, he was arrested, his baggage examined, and it was found that he had in his valise some seven or more quarts of whiskey. He had no intention of leaving the train at Lynchburg or at any other place in Virginia and his sole intention was to carry the liquor with him into the State of North Carolina to be there used as a beverage. The accused was travelling on a through ticket from Baltimore to Asheville and return.

If the Court was bound there to consider only the most literal meaning of the words of the act, then it must have held that this liquor was "transported in interstate commerce" "into" Virginia, which was a dry state.

The indictment was quashed. Mr. Chief Justice White delivered the Opinion of the Court as follows:

"Under this state of facts we think the court was clearly right in quashing the indictment, as we are of opinion that there is no ground for holding that the prohibition of the statute against transporting liquor in interstate commerce 'into any State or Territory the laws of which State or Territory prohibit the manufacture,' etc., includes the movement in interstate commerce through such a State to another. No elucidation of the text is needed to add cogency to this plain meaning, which would however be reinforced by the context if there were need to resort to it, since the context makes clear that the word 'into,' as used in the statute, refers to the State of destination, and not to

the means by which that end is reached, the movement through one State as a mere incident of transportation to the State into which it is shipped."

It cannot be disputed that when this passenger and his baggage were carried from Baltimore to Asheville, both passenger and baggage were "transported in interstate commerce," and it cannot be disputed that this passenger's baggage was transported "into" Virginia.

If the words, "transported in interstate commerce" and "into" had been applied literally and without regard to the purpose of the Reed Amendment, this passenger would have been punished. But this Court, having regard to the purpose of the Amendment, held that it did not include "the movement in interstate commerce through such State to another."

In the present case the Court is asked to follow the same principles and to hold that the words "transportation" and "transport," as used in the Eighteenth Amendment and the National Prohibition Act, refer to the place of destination and not to the means by which that end is reached, and that the movement through the territorial waters of an American port is a mere incident of transportation to the foreign country into which liquor is shipped.

The case of *United States v. Gudger* was decided in April, 1919, and the Prohibition Act was adopted in October of the same year. It is only reasonable to suppose that the drafters of the Act, in dealing with this vexed subject of prohibition, had in mind so recent a decision of this Court bearing on this subject.

In *Street v. Lincoln Safe Deposit Co.* (November, 1920), 254 U. S. 88, the plaintiff had on storage in a safe deposit company in New York City a quantity of intoxicating liquor which he desired to keep there until he was ready to use it for beverage purposes for himself or his guests and then to take it to his home for such use.

This Court held that this did not violate the National Prohibition Act.

It would have been a vain—almost a frivolous—thing for this Court to hold that the plaintiff could legally possess liquor in storage if he could not legally transport it from the storage warehouse to his home. The Court therefore specifically took up this matter of the plaintiff's right to transport the liquor and held (p. 93):

“It is equally clear that to permit the owner to have access to the liquors to take them to his dwelling for lawful use is not a delivery of them within the meaning of this third section.

That transportation of the liquors to the home of appellant under the admitted circumstances is not such as is prohibited by the section is too apparent to justify detailed consideration.”

If the word “transport,” as used in the Eighteenth Amendment and in the National Prohibition Act, is used in the most literal sense, so as to include every carriage of liquor, no matter what the purpose or destination, then obviously the Act would have applied to the carriage of this liquor through the streets of New York to the plaintiff's home. The Court held that the Act did not apply, thus recognizing the ob-

vious principle that the purpose and intent of the Act must be considered in determining whether the transportation in question was prohibited by the Act.

POINT VI.

The transshipment here involved is not "importation" or "exportation" as these words have heretofore been defined by the Federal courts.

However broad the meaning which may be given to these words in common use, it has been judicially settled that as used in the Constitution and Laws of the United States, they have a well-defined meaning which will be applied in all cases where the context does not indicate that a different meaning was intended. Under the decisions, it is not every bringing into, or sending out of, the United States which will constitute "importation" or "exportation."

In *Swan & Finch Co. v. U. S.*, 190 U. S. 143, the plaintiff sued to recover drawbacks on oils manufactured from seed imported into the United States and on which duties had been paid, the oils on which the drawback was sought being used as lubricating oils on vessels sailing from the United States in foreign trade. It was held that such carriage of the oils on outward bound vessels did not constitute an "exportation" within the meaning of the Tariff Act. Mr. Justice Brewer, delivering the opinion of the Court, said at page 144:

"Whatever primary meaning may be indi-

cated by its derivation, the word 'export' as used in the Constitution and Laws of the United States, generally means the transportation of goods from this to a foreign country. 'As the legal notion of emigrating is a going abroad with an intention of not returning, so that of exportation is a severance of goods from the mass of things belonging to this country with an intention of uniting them to the mass of things belonging to some foreign country or other.' 17 Op. Attys. Gen. 583."

In *Flagler v. Kidd* (C. C. A. 2nd Circ. 1897), 78 Fed. 341, the action turned on the legality of a seizure made by the defendant, as collector of customs at the Port of Suspension Bridge. Certain spirits belonging to the plaintiff had been withdrawn by plaintiff from a bonded warehouse in Iowa and shipped thence to New York by way of Canada. No Internal Revenue tax was paid thereon, as plaintiff intended to send the liquor from Canada to New York City and to pay the tax there. The liquors were seized by the collector when they reached New York State, and the legality of the seizure turned on the question whether taking the shipment to and through Canadian territory was legally an exportation. The Court held that it was not, and said at page 344:

"Ordinarily, goods are exported when they are carried out of the country for the purpose of being transferred to a foreign situs. Goods en route from one place to another in the United States are not exported merely because, while in transit, in cars or vessels, they may be temporarily outside the boundaries, or

within the boundaries, of a foreign country. Conversely, goods are imported when they are brought within the country with intent to land them here. *The intent characterizes the act, and determines its legal complexion.*" (Italics ours.)

In *U. S. v. 85 Head of Cattle* (D. C. Mont. 1913), 205 Fed. 679, it was held under a statute authorizing forfeiture of property imported into the United States without the payment of lawful duties, that where cattle, belonging to owners in the Dominion of Canada, strayed across the border into the United States, they were not imported, hence the seizure by Customs officials was unauthorized. The Court said, at page 681:

"To be 'imported,' it must be of foreign situs, and brought hither by the owner, or with his consent, with intent to be here held, used, consumed, or enjoyed, or to be here incorporated in the general mass of property."

In *The Concord*, 9 Cranch. 387, a shipment was made in August, 1812, by neutral Spanish merchants from Teneriffe to London on the British brig "Concord." She was captured by an American privateer and brought into the Port of New York for adjudication. Pending the prize proceedings these goods were sold by an interlocutory order of the District Court and the proceeds brought into the registry. Upon the hearing the property was decreed to be restored to the complainants without the payment of duties. On appeal it was held that the goods having been sold and consumed in the country the exemption of

duty was erroneous. Mr. Justice Story, delivering the opinion, said at page 388:

"Where goods are brought by a superior force, or by inevitable necessity, into the United States, they are not deemed to be so imported, in the sense of the law as necessarily to attach the right to duties. If, however, such goods are afterwards sold or consumed in the country, or incorporated into the general mass of its property, they become retroactively liable to the payment of duties."

As bearing on the meaning of these words "import" and "export" it has already been noted that after the adoption of the Act of Congress prohibiting all importation of smoking opium, Attorney General Wickersham held that the bringing of such opium into a United States port on one vessel for immediate exportation by another was not legally an "importation" and that such transhipment could lawfully be made. 27 Opinions of Attorneys General 440. It will be noted that this opinion was rendered before the statute was passed prohibiting the transshipment of smoking opium.

In the present case the transhipment of these five cases was not "a severance of goods from the mass of things belonging to this country with an intention of uniting them to the mass of things belonging to some foreign country. (*Swan & Finch Co. v. U. S., supra.*) Nor was there any "importation" of this shipment which would correspond to the definitions and precedents above referred to.

The above, being the legal definition of the

words "import" and "export," it should be presumed that they were used in this sense in the Eighteenth Amendment and in the National Prohibition Act; and these words should not be held to extend to a mere transshipment in an American port in the absence of any language requiring such construction.

POINT VII.

Even if it could be held that the transshipment here involved amounts legally to "importation" or "exportation" such transshipment does not constitute "importation" or "exportation" within the prohibition of the Eighteenth Amendment or of the Prohibition Act.

This is so for the reasons already given in cases where an act may come within the letter of a statute and yet not be covered by the statute because not within the intent of Congress.

Turning, then, from what Congress did not mean here by using the word "export" to an inquiry as to what it probably did mean, we have to meet this state of facts: The United States Government was seeking to prevent the use of alcoholic beverages by persons subject to its jurisdiction. It is well known that this use of alcoholic beverages has been opposed partly on economic

grounds, but also on moral grounds; and it would have put the United States in an unfortunate moral position if the Eighteenth Amendment and the Prohibition Act had still left it possible for Americans to ship to other countries beverages, the use of which was considered immoral and uneconomic in the United States. And it is therefore not surprising that the framers of the Eighteenth Amendment and of the Prohibition Act made use of the words "exportation" and "export" so as to put the United States in a proper moral position in this regard.

It may be said in answer to the above, that if Americans could not manufacture alcoholic beverages, there would be nothing to export. But it is well known that some liquors are much improved by an ageing process and that there are, therefore, at all times great quantities of bonded liquors stored in the United States. After the Prohibition Act took effect it became illegal to sell this bonded liquor in the United States for beverage purposes, but if the Act had contained no reference to "export," its owners might have freely exported it so long as it lasted and the United States would have been put in the position of being willing to make money out of a traffic which was too uneconomic and too immoral to be practised where citizens of the United States were to be consumers. This situation would furnish a sufficient reason for prohibiting "export" in the Eighteenth Amendment and Section 3, of Title II, of the Prohibition Act.

The existence of these large quantities of bonded liquors was evidently recognized by Congress in framing the Prohibition Act, for the subject is

repeatedly dealt with. For example: The proviso added to Section 3 of Title II permits the purchase and sale of warehouse receipts covering liquor in bond. Section 37, Title II, permits the storage of liquor in bonded warehouse and the transportation of liquor to and from such warehouse on permit. Section 13 of Title III provides for the issuance of regulations covering, among other things, bonded warehouses.

It is therefore clear that Congress had not forgotten these stores of liquor in bond, and unless the framers of the Eighteenth Amendment and of the Prohibition Act were willing to put the nation in the position of making money out of a traffic too injurious to be carried on at home, it was necessary to use the word "exportation" in the Amendment and the word "export" in Section 3, Title II of the Act, as was done.

POINT VIII.

The inherent character of this merchandise does not require its exclusion and Congress has provided that liquor may be imported for medicinal and other non-beverage purposes.

The merchandise here involved is not so essentially dangerous in itself that its mere physical presence and movement within our borders, however guarded, might expose our people to danger.

This distinction will be seen for example by comparing a shipment of liquor with a shipment

of hides which had not been properly disinfected in accordance with U. S. regulations. Obviously, hides in such condition might expose our people to disease if allowed to be handled at all within our territory, and the Customs Regulations for Transshipment prohibit transshipment in bond of such hides. (Article 694.)

The Eighteenth Amendment and the Prohibition Act do not treat the presence or movement of alcoholic liquor in United States territory and territorial waters as something so dangerous to the people of the United States that it must be altogether prohibited. The Amendment and the Act permit importation for non-beverage purposes, and, compared with that movement of liquor, this transshipment business is a trifle.

This matter of protecting the people against illegal landing has been expressly dealt with in Acts of Congress and ample powers are given to the Treasury Department to protect the people.

The general statute under which these transshipments have been made since 1900 is Section 3005, Revised Statutes, which provides:

“All merchandise arriving at any port of the United States destined for any foreign country may be entered at the custom house, and conveyed, in transit, through the territory of the United States, without the payment of duties, under such regulations as to examination and transportation as the Secretary of the Treasury may prescribe.”

Under this section the Secretary of the Treasury has power to make such regulations as to examination and transportation as he sees fit, so

whatever danger of leakage there is may be dealt with by the Secretary of the Treasury without action on the part of Congress.

The Repeal clause of the Prohibition Act (Section 35, Title 2) provides:

"All provisions of law that are inconsistent with this Act are repealed only to the extent of such inconsistency and the regulations herein provided for the manufacture or traffic in intoxicating liquor shall be construed as in addition to existing laws. This Act shall not relieve anyone from paying any taxes or other charges imposed upon the manufacture or traffic in such liquor. * * *"

Under present Revenue Laws a duty must be paid on liquor imported for non-beverage purposes (38 St. L. 114, Schedule H; Act Oct. 3, 1913, § 237) therefore by the clause quoted above the Prohibition Act does not excuse the payment of these duties. It being, therefore, necessary now, as before prohibition, to collect duties on liquor actually imported, it is as necessary now, as it was before prohibition, that Section 3005 of the Revised Statutes above quoted should remain in force in respect to liquor which is not imported but which only temporarily passes through the port.

POINT IX.

A special Federal Statute has long existed permitting the transshipment in our ports of merchandise destined for a foreign country, and a general statute such as the Prohibition Act, does not repeal such a special statute "unless the repeal be expressed or the implication to that end be irresistible."

It has been noted above that Section 3005, U. S. Revised Statutes, passed May 31, 1900, provides:

"All merchandise arriving at any port of the United States destined for any foreign country may be entered at the custom-house, and conveyed in transit, through the territory of the United States, without the payment of duties, under such regulations as to examination and transportation as the Secretary of the Treasury may prescribe."

Section 3005 was followed by clauses relating to the making of declarations, giving of bonds, etc.

By Title II, Section 35 of the National Prohibition Act, it is provided:—

"All provisions of law that are inconsistent with this Act are repealed only to the extent of such inconsistency and the regulations herein provided for the manufacture or traffic in intoxicating liquor shall be construed as in addition to existing laws."

Various provisions will be found in the Revised Statutes relating to the handling of intoxicating

liquor which under the provisions of Title II, Section 35, of the Prohibition Act, above quoted, must still be considered in force.

For example, Section 2775 of the Revised Statutes provides that the master of any vessel having on board distilled spirits or wines, shall within forty-eight hours after his arrival report the quantity and kinds of spirits and wines on board such vessel as sea stores in writing to the surveyor or officer acting as Inspector of the Revenue of the port at which he has arrived.

It is evident that Section 2775 related to intoxicating liquors which are not to be used for beverage purposes in the United States and it is, therefore, not inconsistent with the provisions of the National Prohibition Act.

It has been already noted that duty is charged on liquor imported for non-beverage purposes, and Section 3005 is required now as much as it was before prohibition to cover the case of liquor which temporarily comes into our ports for trans-shipment, but which is not imported. It is submitted, therefore, that Section 3005 is not inconsistent with the Prohibition Act and that it does not come within the repealing clause of that Act.

It cannot be said that Section 3005 has been repealed, for it is a necessary part of the legal machinery of the nation for merchandise which passes through the country or through the territorial waters but without being imported, and it applies to "all merchandise."

It cannot have been repealed in so far as it applied to liquor intended for beverage purposes, unless it was intended by the Eighteenth Amendment and by the Prohibition Act to regulate

beverages of the citizens of other nations, and the phraseology of the Eighteenth Amendment would seem to negative such a claim.

As previously noted in this brief, when Congress was dealing with smoking opium, which could not be imported at all into the United States, it expressly dealt with this subject of transshipment and took smoking opium out of the merchandise which could otherwise have been transshipped under this section. Congress has made no such exception in respect to liquor intended for beverage purposes in other nations, and it is submitted that Section 3005 therefore applies to the shipment involved in this case.

Repeals by implication are not favored and usually occur only where there is such irreconcileable conflict between the earlier and later statutes that effect reasonably cannot be given to both. The courts have also laid down the rule that where there are two statutes upon the same subject, the earlier being "special" and the later "general," the presumption is, in the absence of an express repeal or an absolute incompatibility that the "special" is intended to remain in force as an exception to the "general."

The Court said in *Ex Parte United States*, 226 U. S. 420—

"When the issue is thus narrowed, solution is readily reached by the application of the elementary rule that a special and particular statutory provision affording a remedy for particular and specific cases is not repealed by a general law unless the repeal be express or the implication to that end be irresistible."

In *Washington v. Miller*, 235 U. S. 422, the Court said,

"In these circumstances, we think there was no implied repeal and for these reasons: First: Such repeals are not favored and usually occur only where there is such an irreconcilable conflict between an earlier and a later statute that effect reasonably cannot be given to both. (*U. S. v. Healey*, 160 U. S. 136, 146; *U. S. v. Greathouse*, 166 U. S. 601, 605.) Second: Where there are two statutes upon the same subject the earlier being special and the later general the presumption is, in the absence of an express repeal, or an absolute incompatibility that the special is intended to remain in force as an exception to the general (*Townsend v. Little*, 109 U. S. 504, 512; *Ex parte Crow Dog*, Id. 556, 570; *Rodgers v. U. S.* 185 U. S. 83, 87 and 89), and Third: There was in this instance no irreconcilable conflict or absolute incompatibility for both statutes could be given reasonable operation if the presumption just named were recognized."

POINT X.

It is inherently improbable that Congress can have intended to prohibit these transshipments when it framed the Prohibition Act.

In adopting nation-wide prohibition the United States Government made one of the greatest experiments attempted in our history. And the thing which the friends of prohibition had chiefly

to fear was a reaction of popular opinion which would cause a change in the law and not minor violations of the law.

It was certain that there would be violations and the usual method which has been adopted by Congress to minimize violations has been to give to an executive department power to make regulations dealing with details. Such a power had already been given to the Treasury Department with respect to the safeguarding of these trans-shipments (Statutes § 3005).

But the great danger to prohibition was reaction. Prohibition has had a long and checkered history in the United States. It has repeatedly been tried by States, and parts of States, and then later abandoned when its actual working has antagonized classes of the people who had not originally opposed it.

This nation-wide prohibition of 1919 was particularly open to reaction. It had been adopted at about the same time as war prohibition; most of the States had considered the Eighteenth Amendment in war time and the war impulse had much to do with the adoption of the amendment. Peace was sure to put a strain on any drastic legislation adopted under such circumstances. And it is improbable that Congress intended to invite reaction by giving to a part of the Act what is practically an extra territorial effect.

These shipments are not our commerce; they are the commerce of other nations and our interference with them is an interference with the commerce of other nations, and we have every reason to assume that this interference will be resented. Such action on our part might, there-

fore, well lead to action by foreign countries which would seriously affect American exports.

Our principal foreign commerce is with nations whose people do not agree with us on the subject of prohibition, and an application of our prohibition laws to interfere with a trade which was theirs and not ours might stir up an irritation out of all proportion to the real importance of the interference.

To whatever extent retaliation by other countries affected our exports, it would affect that large body of our citizens who are interested in exporting or in producing what is exported. And this might well enlist against prohibition many of our citizens not previously opposed to it but who would become its enemies when they found that their business was being interfered with because we had interfered with something which really did not concern us.

Such are the situations out of which reactions grow, and it seems altogether improbable that Congress can have intended to invite any such international friction and possible complications.

POINT XI.

If the National Prohibition Act be construed as prohibiting transshipments of the kind here involved, it is unconstitutional. Such a construction ought therefore to be avoided.

The Eighteenth Amendment prohibits "manufacture, sale, or transportation of intoxicating

liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes."

This is the sole provision of the Constitution under which Congress had authority to enact the Prohibition Act.

That Act can not be upheld under the commerce clause, for in the *Trade Mark cases*, 100 U. S. 82 at page 96 this Court held

"* * * we proceed to remark that a glance at the commerce clause of the Constitution discloses at once what has been often the subject of comment in this court and out of it, that the power of regulation there conferred on Congress is limited to commerce with foreign nations, commerce among the States, and commerce with the Indian tribes. While bearing in mind the liberal construction, that commerce with foreign nations means commerce between citizens of the United States and citizens and subjects of foreign nations, and commerce among the States means commerce between the individual citizens of different States, there still remains a very large amount of commerce, perhaps the largest, which, being trade or traffic between citizens of the same State, is beyond the control of Congress.

"When therefore, Congress undertakes to enact a law, which can only be valid as a regulation of commerce, it is reasonable to expect to find on the face of the law, or from its essential nature, that it is a regulation of commerce with foreign nations, or among the several States, or with the Indian tribes. If not so limited, it is in excess of the power of

Congress. If its main purpose be to establish a regulation applicable to all trade, to commerce at all points, especially if it be apparent that it is designed to govern the commerce wholly between citizens of the same State, it is obviously the exercise of a power not confided to Congress."

The provision of law on which the Government relies is Section 3 of Title II of the Prohibition Act which reads:

"No person shall on or after the date when the Eighteenth Amendment to the Constitution of the United States goes into effect, manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor except as authorized in this Act."

This provision of law is therefore expressly connected with the Eighteenth Amendment as an enforcement of that amendment and it is plain that Congress in using this language intended to enforce the Eighteenth Amendment and not to exercise the powers given to it under the commerce clause of the Constitution.

A statute enacted pursuant to a constitutional amendment which authorizes Congress to enact laws for the enforcement of the rights secured by such amendment, is void if it is broader than the amendment which it is designed to enforce.

U. S. v. Reese, 92 U. S. 214, was based on an indictment against two inspectors of a municipal election in Kentucky for refusing to receive and count the vote of Garner, a citizen of the United States of African descent.

The case arose under the statute passed by Congress to carry into effect the Fifteenth Amendment which had provided that the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude. The first section of that Act provided that all citizens otherwise qualified should be entitled to vote without distinction of race, color, etc.

The second section provided a punishment for any officer charged with the duty of furnishing to citizens an opportunity to perform any act which was a prerequisite of voting, who should omit to give all citizens equal opportunity on account of race, color, etc.

The third section provided that whenever, under the Constitution or Laws of a State, an act is required to be done by a citizen to entitle him to vote, the offer of the citizen to perform the act should be held to be a compliance with the law if the act failed to be carried into execution by reason of the wrongful act of an officer charged with the duty to act thereon, and further providing that the officer who shall wrongfully refuse to count the vote shall be subject to certain penalties.

The fourth section provided for the punishment of any person who should by force, bribery or other unlawful means hinder any citizen from doing any act required to be done to qualify him for voting.

It will be observed that the first and second sections of the Act related to discrimination based on race, color, and previous condition of servitude, but that sections third and fourth re-

lated to interference with the right of a citizen to vote, but without specific reference to discrimination by reason of race, color, etc., to which the Fifteenth Amendment had related.

The indictment was under the third and fourth sections. The Court gave judgment for the defendants and held that the power of Congress to legislate on the subject of voting in State elections rested upon the Fifteenth Amendment, and that this power could be exercised only by providing punishment when the wrongful refusal to receive the vote was based on the race, color, etc., of the citizen, and did not extend to discrimination not based on race, color, etc.

To the same effect is the case of *Karem v. U. S.*, 121 Fed. Rep. 250, where the Circuit Court of Appeals for the Sixth Circuit, Judge Lurton writing, held on appeal that an Act of Congress could not be sustained as an exercise of the power given by the Fifteenth Amendment where the Act is broader in its terms than the Amendment, and where the language used covers wrongful acts without as well as within the terms of the Amendment.

The jurisdiction of Congress as to prohibition of intoxicating liquors being confined, in express terms by the Amendment, to liquor for beverage purposes within the territory of the United States, the provisions of the National Prohibition Act are of no effect if they be construed as covering acts both within and without the jurisdiction of Congress as defined by the Eighteenth Amendment.

POINT XII.

The laws of Congress are always to be construed so as to conform to the provisions of a treaty if possible to do so without violence to their language.

Article XXIX of the Treaty of Washington between the United States and Great Britain provided as follows:

"It is agreed, that for the term of years mentioned in Article XXXIII of this treaty, goods, wares, or merchandise arriving at the ports of New York, Boston, and Portland, and any other ports in the United States which have been or may, from time to time, be specially designated by the President of the United States, and destined for her Britannic Majesty's possessions in North America, may be entered at the proper custom-house and conveyed in transit, without the payment of duties, through the territory of the United States, under such rules, regulations, and conditions for the protection of the revenue as the Government of the United States may from time to time prescribe; and under like rules, regulations, and conditions, goods, wares, or merchandise may be conveyed in transit, without the payment of duties, from such possessions through the territory of the United States for export from the said ports of the United States.

"It is further agreed that, for the like period, goods, wares, or merchandise arriving at any of the ports of her Britannic Majesty's possessions in North America, and destined for the United States, may be

entered at the proper custom-house and conveyed in transit, without the payment of duties, through the said possessions, under such rules and regulations, and conditions for the protection of the revenue as the governments of the said possessions may from time to time prescribe; and, under like rules, regulations, and conditions, goods, wares, or merchandise may be conveyed in transit, without payment of duties, from the United States through the said possessions to other places in the United States, or for export from ports in the said possessions."

(There has been some discussion of the question whether Article XXIX of the Treaty of Washington was repealed in 1883. The documents bearing on that subject are referred to in Appendix B of this brief. It is submitted that an examination of these will show that Article XXIX is still in force.)

To reverse the policy of the country which has rested for so many years on the provisions of treaties and the comity of nations, particularly to do this on mere implication, would run counter to the policy and practice of our Government.

In the case of the *United States v. 43 Gallons of Whisky*, 108 U. S. 491, the Court considered the effect of a statute imposing a Special Internal Revenue tax for selling liquors in connection with the provisions of a treaty with Chippewa Indians which prohibited the introduction and sale of spirituous liquors in the Indian country. The court decided that the payment of the tax did not exempt the owner of the goods

from the penalty imposed for selling liquor to Indians. Justice Field said (p. 496):

"Congress never intended to interfere with the operation of the treaty, or to sanction the sale of liquors in any ceded territory where an express stipulation provides that they shall not be sold * * *. It would require very clear expressions in any general legislation to authorize the inference that Congress purposed to depart from its long-established policy in regard to a matter of so vital importance to the peace and to the material and moral well-being of these wards of the nation. There is also another consideration. *The laws of Congress are always to be construed so as to conform to the provisions of a treaty, if it be possible to do so without violence to their language.* This rule operates with special force where a conflict would lead to the abrogation of a stipulation in a treaty making a valuable cession to the United States." (Italics ours.)

In the case of *Lem Moon Sing v. United States*, 158 U. S. 538, Mr. Justice Harlan in considering the effect of the Chinese Exclusion Acts on the treaties between the United States and China and after taking into consideration the various Acts of 1892 and 1894, decided that the treaty rights had been annulled by the provisions of the Act in 1894. The court said, p. 549:

"If the Act of 1894 had done nothing more than appropriate money to enforce the Chinese Exclusion Act, the courts would have been authorized to protect any right the appellant had to enter the country, if he was of the class entitled to admission under exist-

ing laws or treaties, and was improperly excluded. But when Congress went further, and declared that in every case of an alien excluded by the decision of the appropriate immigration or customs officers 'from admission into the United States under any law or treaty,' such decision should be final, unless reversed by the Secretary of the Treasury, the authority of the courts to review the decision of the executive officers was taken away. *United States v. Rodgers*, 65 Fed. Rep. 787. If the Act of 1894, thus construed, takes away from the alien appellant any right given by previous laws or treaties to reenter the country, the authority of Congress to do even that cannot be questioned, *although it is the duty of the courts not to construe an act of Congress as modifying or annulling a treaty made with another nation, unless its words clearly and plainly point to such a construction.* *Chew Heong v. United States*, 112 U. S. 536, 539, 559; *Head Money Cases*, 112 U. S. 580, 599; *Whitney v. Robertson*, 124 U. S. 190, 195; *Chinese Exclusion Case*, 130 U. S. 581, 600. There is no room in the language of the Act of 1894 to doubt that Congress intended that it should be interpreted as we have done in this case." (Italics ours.)

The National Prohibition Act contains no language which indicates that Congress intended to abrogate the treaty provisions as to transshipment of liquor from ports in Great Britain to ports in her North American possessions. Indeed, the implications are entirely the other way, for the Act itself deals only with the use of liquor as a beverage in this country and modifies the existing laws only to the extent that is nec-

essary to carry out this intention. Congress recognizes this, for, as noted above, the 35th section provides that the provisions of the National Prohibition Act shall be construed as in addition to existing laws.

Congress has power to abrogate a treaty by statute which provides to that effect, but it is submitted that Congress did not exercise that power with respect to these treaty rights when it passed the National Prohibition Act.

POINT XIII.

The allegations of the answer in reference to the theft of liquors pending transshipment and in reference to the unlawful landing of liquor are not here relevant.

A.

Thefts of Transit Shipments by Railroads.

Aside from the fact that these thefts are crimes which are not here relevant, there is a wide practical distinction between the carriage of liquor for distances of some hundreds of miles across territory of the United States to one of our ports as contrasted with transshipment in the port itself. This transshipment in a port is frequently done by lighter, so that the merchandise never physically rests even on a pier, and, as this case presents merely marine transshipments, it is submitted that thefts from railroads are not at all material.

B.**Thefts Pending Transshipments in Port.**

The thefts alleged under this heading all occurred some time after the Act was framed. Under the method of transshipment as explained in the pleadings, it will be seen that these thefts occurred while under the control of customs officers.

Section 3005 of Revised Statutes, above referred to, gave the Secretary of Treasury full power to make any necessary regulations in reference to carrying the transshipped goods and there is no reason to suppose that Congress assumed that Government officials would fail to discharge a duty imposed upon them where there was ample power to make any needed regulations or to adopt any necessary precautions.

Under the Prohibition Act liquor can be imported for non beverage purposes under regulations of the Treasury Department (Title II, Sec. 3). Under Section 3005 liquor can be transshipped under regulations of the Treasury Department. Congress was satisfied that Treasury regulations were a sufficient protection against leakage in the first case and there seems no reason why such regulations are not a sufficient protection in the second.

The statistics given in Exhibit A, annexed to the answer, show what was stolen in two years from nineteen shipments which arrived on vessels of the complainant, but no statement is made as to the shipments from which there was no theft. So, it is impossible to determine exactly

from these statistics what the proportion of the loss was as compared with the total amount shipped during the period set forth in the answer.

The amount arriving at the Port of New York on complainant's vessels for transshipment during the calendar years 1918, 1919 and 1920 is set forth in Exhibit A annexed to the complaint. This exhibit shows the large quantities of liquor shipped to New York for transshipment and that the losses set forth in answer are small compared with the amounts transshipped.

Exhibit B annexed to the answer shows the number of shipments in vessels belonging to others in which there were losses but there is nothing to show the large number of shipments in which there were no losses.

The total of the shipments of cases in Exhibit B, exclusive of the shipments in barrels, shows that less than 269 cases out of a total of 23,097 cases coming into the Port of New York by steamship for transshipment in the port were lost and these do not include shipments where there were no losses.

C.

Illegal Landing of Liquor.

The illicit landing in the United States of liquor brought from foreign countries is "importation" (see cases under Point VI). This is expressly prohibited by the National Prohibition Act. It is therefore just as illegal now as it would be if the courts should hold that no foreign vessel can enter our territorial waters with liquor abroad.

The acts complained of by the defendant are a crime, and the reason this crime is not prevented is because some of the criminals have not been caught and not because there is not a statute already in force to cover their offense.

The illicit landings, to which the defendant refers, are from vessels clearing from Nassau in the Bahama Islands documented for Halifax. As a practical matter, an examination of charts and globes will show that the true course for vessels between those ports is a long distance off our coast, and if any vessel so bound, and not obviously in distress, appears in our territorial waters, her presence there would require explanation. And if, in addition to this, she were found in such territorial waters, hove to or anchored, and with liquor aboard, these circumstances would require a great deal of explanation. The difficulty is not caused by absence of statute but it is the practical difficulty of catching the criminal.

This offense of illicitly introducing liquor is analogous to smuggling, and there would seem to be no more reason for prohibiting the carriage of liquor over our territorial waters to prevent this crime than there would be for prohibiting carriage over those waters of any other sort of merchandise to prevent the crime of smuggling.

POINT XIV.

The provisions of the Prohibition Act in reference to transportation through the Panama Canal do not affect the subject under consideration.

(This subject is referred to only because the Assistant Attorney General referred to it in his opinion of 4 February, 1921.)

In the National Prohibition Act the provisions as to the Canal Zone are not included in the general provisions relating to the United States, but a special section (Title III, Sec. 20) was incorporated in the act to deal with the Canal Zone. This Section 20 places the Canal Zone in a special position, for in addition to the provisions against importation, manufacturing, selling and transportation, it is made unlawful to "have in one's possession or under one's control within the Canal Zone, any alcoholic liquors except for sacramental, scientific, pharmaceutical, industrial or medicinal purposes." As contrasted with this, the provisions of Sec. 33, Title II, which relate to the United States, provide: "It shall not be unlawful to possess liquors in one's private dwelling, while the same is occupied and used by him as his dwelling only and such liquor need not be reported."

The Canal Zone is thus recognized by Congress as being different from continental United States in its position and requirements. Congress has not therefore relied merely upon the general provisions of the act for the regulation of this specially situated possession, but has provided for it

by this separate Section 20 of Title III, and, as above noted, has made the zone absolutely dry, while this cannot be said of the provisions of the act applying to the United States. This Section 20 of Title III took effect before the Eighteenth Amendment was in force (Prohibition Act Title III Sec. 21) and the direct power of Congress over the Zone made special legislation possible. (10 U. S. compiled statutes § 10031.)

In Section 20 occurs this proviso: "provided that this *section* shall not apply to liquor in transit through the Panama Canal or in the Panama Railroad." (Italics ours.) It will be noted here that Congress has not said that the act shall not apply, but that it is the section which shall not apply, thus recognizing the fact that the Canal Zone is dealt with in a special way and under a special section.

Under these circumstances, it cannot be that by referring in this Section 20 to carriage in the Panama Canal and on the Panama Railroad Congress intended that that was the only transportation of liquor which could take place anywhere in the United States or its possessions. Section 20 being the only provision which applies to the Canal Zone it was necessary to make that section complete by dealing with the Canal traffic. This proviso serves thus to complete Section 20. It has no bearing on the interpretation of the Act itself in its application to the United States. It does however indicate an intention on the part of Congress not to interfere with the commercial carriage by other nations of liquor which is not intended for use in United States territory for beverage purposes.

LAST POINT.

The final decree of the District Court in favor of the defendant-respondent should be reversed and the cause remanded to the District Court with instruction to enter a decree granting the relief prayed for in the Bill of Complaint.

Respectfully submitted,

LORD, DAY & LORD,
*Solicitors for the Anchor Line
(Henderson Brothers) Ltd.*

LUCIUS H. BEERS,
FRANKLIN B. LORD,
ALLEN EVARTS FOSTER,
Of Counsel.

APPENDIX A.**Opinion of Attorney General.****TRANSIT SHIPMENTS OF LIQUOR TOUCHING AT PORTS
OF THE UNITED STATES.**

Department of Justice,
February 4, 1921.

SIR:

This will acknowledge receipt of your request for an opinion as to whether the Eighteenth Amendment to the Constitution and the National Prohibition Act prohibit or affect in any way "in transit" shipments of liquor for beverage purposes touching at the ports of or moving through the United States when originating in and destined to foreign countries under the provisions of Section 3005 of the Revised Statutes as amended by the Act of May 21, 1900.

Section 3005, Revised Statutes, as amended is as follows:

"All merchandise arriving at any port of the United States destined for any foreign country may be entered at the custom-house, and conveyed, in transit, through the territory of the United States, without the payment of duties, under such regulations as to examination and transportation as the Secretary of the Treasury may prescribe."

Section 3 of the National Prohibition Act provides:

"No person shall on or after the date when the Eighteenth Amendment to the Constitution of the United States goes into effect,

manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor *except as authorized* in this Act * * *."

By virtue of this provision any and all dealings in intoxicating liquors for beverage purposes within the jurisdiction of the United States are prohibited, except in so far as authority therefor may be found elsewhere in the Act. Nowhere therein is transportation for beverage purposes authorized; except that the prohibitions of Section 20 of Title III, which prohibits the importation or introduction into and the manufacture, sale, transportation, etc., within the Canal Zone, are made inapplicable to liquor in transit through the Panama Canal or on the Panama Railroad. By expressly excepting transportation through the Panama Canal and on the Panama Railroad it is to be assumed that Congress intended that transportation elsewhere should be prohibited.

By virtue of Section 33 of Title II, the possession of liquor for beverage purposes is permitted in the home, provided same is for the personal consumption only of the owner thereof and his family and bona fide guests. No other possession for beverage purposes being authorized, no other possession is lawful.

In the absence of express authorization, in order to arrive at the conclusion that liquor for beverage purposes arriving at any port of the United States destined for any foreign country may be entered at the custom-house and conveyed, in transit, through the territory of the United States, it would be necessary to hold either that such liquor while in transit is neither possessed

nor transported within the United States, or that the Prohibition Act does not apply to liquor not intended for beverage consumption within the United States. Neither of these positions is tenable. The word transport as used in the Act must be presumed to have its usual meaning, viz: to carry or to convey from one place to another, the taking up of persons or property at some point and putting them down at another (*Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196); and whether the possession during transportation be in the carrier (which I think it is) or in the owner, both transportation and possession are within the territory of the United States. In the second place the Act is not in terms limited to liquor intended for beverage purposes within the United States. By Section 1 of Title II "liquor" and "intoxicating liquor" are defined to include any liquors containing over one-half of one per cent. of alcohol by volume which are fit for beverage purposes; and by Section 2 the manufacture, sale, etc., of such liquors are prohibited except as authorized, regardless of the place where they are intended to be consumed. This is obvious from the prohibition upon their exportation.

Having arrived at the conclusion that liquor in transit through the United States would be both transported and possessed in violation of the National Prohibition Act, it is not necessary for the purposes of this opinion to determine whether the procedure established by Section 3005, Revised Statutes, would involve either prohibited importation or exportation.

The National Prohibition Act applies to all the territory of the United States that is not otherwise excepted from its operation, and extends to

all waters within its territorial limits, including a marine league from the shore; within those waters the manufacture, sale, transportation, possession, etc., is prohibited.

My conclusion therefore is that the provisions of Section 3005, Revised Statutes, do not apply to intoxicating liquors for beverage purposes, and that the National Prohibition Act prohibits "in transit" shipments of such liquors touching at the ports of or moving through the United States, though same originate in and are destined to foreign countries.

Respectfully,

FRANK K. NEBEKER,
Acting Attorney General.

To the Secretary of the Treasury.

APPENDIX B.

NOTES ON QUESTION WHETHER ARTICLE XXIX OF TREATY OF WASHINGTON IS STILL IN FORCE.

The Treaty of Washington proclaimed July 4th, 1871, between the United States and Great Britain, referred primarily to the Alabama Claims. A few other international subjects were, however, dealt with, as follows:

Articles XVIII to XXV inclusive, known as the "fishery" articles, related to that subject.

Articles XXVI to XXVIII inclusive, related to the navigation of the Great Lakes and connecting canals.

Article XXIX, which is here important, related to the subject of carriage in bond and it provided that "It is agreed that for the term of years mentioned in Article XXXIII" merchandise arriving at certain ports of the United States and destined for British possessions might be carried in bond without payment of duties.

Article XXX provided that "for the term of years mentioned in Article XXXIII of this treaty" citizens and subjects of the two countries might carry merchandise without duty on the waters of the Great Lakes and St. Lawrence River.

Article XXXI provided for carriage of lumber, without duty, on the St. John's River.

Article XXXII provided that the "fisheries" articles (XVIII to XXV) shall extend to the Colony of Newfoundland as far as applicable.

Article XXXIII of the treaty, above referred to, was the one which regulated the application of such articles as particularly affected Canada; that is, the "fisheries" Articles XVIII to XXV above referred to and Article XXX which, as noted above, related to the navigation of the Great Lakes and the St. Lawrence River, and this Article XXXIII provided.

"The foregoing Articles XVIII to XXV, inclusive, and Article XXX of this treaty shall take effect as soon as the laws required to carry them into operation shall have been passed by the Imperial Parliament of Great Britain, by the Parliament of Canada, and by the Legislature of Prince Edward's Island on the one hand, and by the Congress of the United States on the other. Such assent having been given, the said articles shall remain

in force for the period of ten years from the date at which they may come into operation; and further until the expiration of two years after either of the high contracting parties shall have given notice to the other of its wish to terminate the same; each of the high contracting parties being at liberty to give such notice to the other at the end of said period of ten years or at any time afterward."

It will be observed that the provisions of Article XXXIII, relating to termination, applied only to the "fisheries" Articles XVIII to XXV, and to the Great Lakes, Article XXX, and that they did not refer to Article XXIX, which referred to carriage in bond.

On March 3, 1883, a joint resolution was passed by Congress to give notice on July 1 following, of the termination of Articles XVIII to XXV, inclusive, and of Article XXX of the Treaty of Washington. This resolution was transmitted to the American Minister in London, April, 1883, and communicated to the British Government in the same month, and on July 2nd, 1883, formal notice of termination was given.

In July, 1887, the Secretary of State (Mr. Bayard) sent a communication to the Secretary of the Treasury in reply to an inquiry from the latter, whether Article XXIX of the Treaty of Washington was still in force. (S. Ex. Doc. 40, 52 Cong. 2 Sess. 11.)

In that communication Mr. Bayard reviews what has been stated above and says:

"• • • it does not appear that either Article 29 or Article 30 was so united with

the fisheries articles that neither could stand without the latter. Such was unquestionably the view both of the Senate and the House of Representatives when, without a division, they passed a joint resolution directing the notice of termination of Articles 18-25 and Article 30 to be given, and repealed the legislation which had been adopted to carry them into effect. The records of the debates of both bodies show that the only question raised in either House as to the resolution directing notice to be given was whether that part of the resolution which repealed the legislation carrying into effect the articles directed to be terminated would affect the provisions of the Act of March 1, 1873, which gave effect to Article 29. And it was in order to avoid the repeal of those provisions by implication that the provisions that the Act of 1873 should be repealed 'so far as it relates to the articles of said treaty so to be terminated' was inserted. Those words were not in the resolution as originally reported to the Senate, but were inserted to meet the objection above stated.

"You will also see, by a memorandum accompanying this letter, that in the debates in Congress during the last session on the various bills introduced in relation to the Canadian fisheries, it was generally understood and stated that Article 29 remained in force.

"But the best evidence that the notice of termination of Articles 18-25, inclusive, and Article 30, was not intended or supposed by Congress to affect the continued existence of Article 29, is the fact already adverted to that the provisions of the Act of March 1, 1873, carrying into effect the stipulations of

that Article, were not included in that clause of the resolution of 1883 which repealed the municipal legislation enacted to carry certain articles of the treaty, including Article 29, into effect, and it would, therefore, seem that the transit of goods in bond, according to the terms of Article 29, is still authorized by Act of Congress."

In view of the controversy which later developed on the question of whether Article XXIX was or was not terminated in 1883, it is important to note that *the only action which could have served to terminate any article of the Treaty was the joint resolution of Congress of March 3, 1883. That resolution did specifically direct the termination of Articles XVIII to XXV and Article XXX. The resolution did not refer to Article XXIX*, and Section 3 of the resolution referred to the Act of Congress of March 1, 1873, which had been passed to carry into effect the Treaty of Washington, and provided that that act "so far as it relates to the articles of said Treaty so to be terminated shall be and stand repealed." (22 U. S. Statutes, 641.)

In a message sent by President Cleveland to Congress in 1888, he took the ground that Article XXIX had been terminated by the Congressional and executive action above referred to, basing his conclusion on the reference made in Article XXIX to the "terms of years mentioned in Article XXXIII." (H. Ex. Doc. 434, 50 Cong. 1 Sess.)

It is submitted that a study of Articles XVIII to XXXIII of the Treaty of Washington will show that certain of them would have to depend on the passage of statutes by four legislative

bodies, viz., the British Parliament, the Parliament of Canada, the Legislature of Prince Edward's Island, and the Congress of the United States, and as it was intended that certain of these sections should remain in force for ten years, not from the date of the Treaty but from the date in which the articles should come into operation, it was necessary in defining this time to refer to the action of these four legislative bodies.

It would have involved cumbrous repetition quite unsuitable in a document of this character to have referred in each of the sections of the Act to action by these four bodies as fixing the time when the article should come into operation. To avoid this repetition the framers of the Treaty devoted one entire article (Article XXXIII) to this subject of the passage of laws by these four different legislative bodies, and provided that such assent having been given, the articles should remain in force for a period of ten years from the date at which they might come into operation; and further, until the expiration of two years, after either of the high contracting parties gave notice to the other of its wish to terminate the same, and, for the sake of brevity, when they were referring to this ten-year period in Articles XXIX and XXX, they called it "the term of years mentioned in Article XXXIII."

This reference to Article XXXIII was evidently to avoid lengthy repetition. But the Treaty did not say, and Congress did not say, that all articles which were to continue for this period were so connected that the termination of one would terminate all.

No notice was given by the United States Gov-

ernment of any intention to terminate Article XXIX and Congress did not direct such notice to be given.

A number of Senators, including Senators Edmunds and Sherman, in speaking before the Senate, dissented from President Cleveland's opinion that Article XXIX was not in force (Cong. Record, Aug. 25, 1888, 50 Cong. 1 Sess. XIX 7904, 7906 and 7919). Both the majority and minority report of the Senate Committee on Foreign Relations, in relation to another Treaty, took the ground that Article XXIX of the Treaty of Washington was then (1888) in force. (S. Report 3, 50 Cong. 1 Sess. 14, 41.)

It is important to observe that some of the best constitutional lawyers of the country, including Senators Sherman, Edmunds, Evarts and Frye, joined in this report.

Later, President Harrison in a message took the view that Article XXIX had been abrogated, but it will appear by a communication from Mr. Sherman, as Secretary of State, to the Secretary of the Treasury, as late as 1898, that the old question as to whether or not Article XXIX had been abrogated was still regarded as an open one at that time (224 MS. Dom. Let. 260).

(See Moore's International Law Digest, Vol. V, pp. 327-335, for discussion of this subject.)

From what has been stated above, it is submitted that the group of eminent constitutional lawyers who were in the Senate thirty years ago were right in their view that Article XXIX of the Treaty of Washington had not been abrogated. And, if so, then the provisions of that article ought to be considered in passing on this question.

The theory that Article XXIX was intended to be terminated in 1883 apparently grows out of a statement contained in the account of the negotiations of the Joint High Commissioners who negotiated the treaty. Their statement was:

"The transit question was discussed, and it was agreed that any settlement that might be made should include a reciprocal arrangement in that respect for the period for which the fishery articles should be in force."

V Moore's International Law Digest, p. 331.

The suggestion in this statement is that this right of transshipment was given by the treaty in some way as an equivalent for the privileges given in the fisheries articles, and that as the fisheries articles were terminated the transshipment article ought also to be terminated.

Whatever the Commissioners may have had in mind in their various discussions, it is submitted that we must now follow the terms of the treaty which they framed and which was finally ratified. There is nothing in the treaty to indicate that Article XXIX was to be terminated if the fisheries articles were terminated, and as this was a solemn international instrument, prepared and considered with great care, it is submitted that it is improper—by referring to the notes of the Commissioners—to inject something into the treaty which neither they nor the governments concerned inserted in the treaty.

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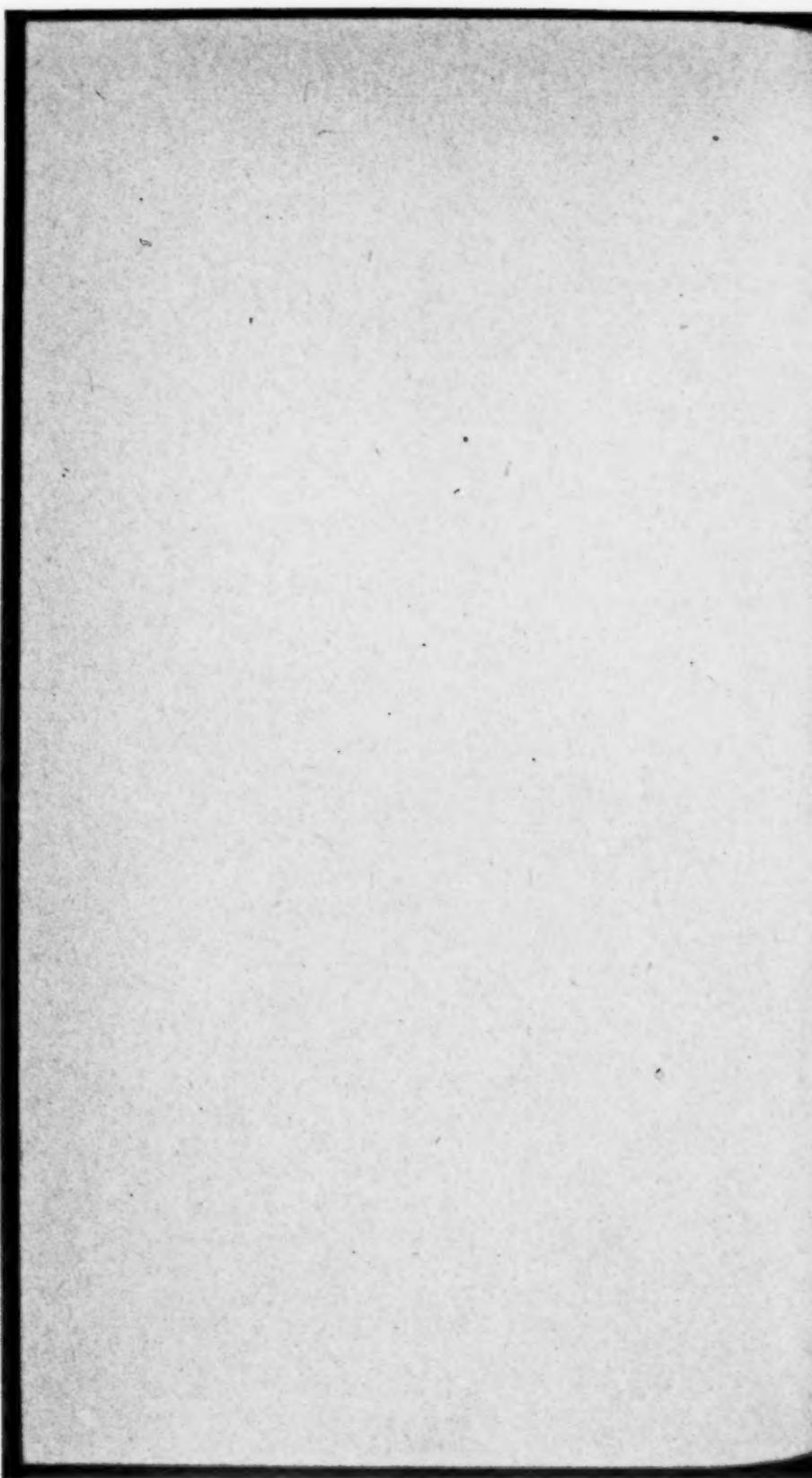
In the Supreme Court of the United States

John A. Grogan, Collector of Internal Revenue, and
Richard I. Lawson, U. S. Collector of Customs,
Defendants and Appellants,
v.
Iram Walker & Sons, Limited,
Plaintiff and Appellee.

October Term, 1921.

BRIEF FOR APPELLEE.

Alfred Lucking,
Counsel for Appellee.



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In the Supreme Court of the United States

John A. Grogan, Collector of Internal Revenue, and
Richard I. Lawson, U. S. Collector of Customs,
Defendants and Appellants,
v.
Hiram Walker & Sons, Limited,
Plaintiff and Appellee.

October Term, 1921.

BRIEF FOR APPELLEE.

The Question:

May the practice, which has hitherto prevailed, of "shipping in bond" of liquors *through* the United States—that is from one foreign country through the United States to another foreign country—be continued lawfully under the National Prohibition Act," or is the same prohibited under the true interpretation of its terms? This practice has prevailed, under the treaty and the statute, for something like fifty years, and it continued during the period of wartime prohibition without abuse, and it has continued since the National Prohibition Act took effect down to the present time, without abuse.

THE CASE WAS HEARD BELOW, somewhat informally, upon the bill and motion to dismiss, and answer subsequently (but before decree) filed.

The court decreed that "the allegations of material facts contained in the bill of complaint are true" (Rec., p. 26).

To this, no assignment of errors was made (Rec., p. 28) and we proceed to state the substance of the bill.

**Compendium of Bill
of Complaint.**

- (1) Plaintiff is a corporation of Ontario, Canada.
- (2) Defendant, Lawson, is United States Collector of Customs at Detroit, and defendant, Grogan, is United States Collector of Internal Revenue.
- (3) Plaintiff, being a distiller, has for more than thirty years sold its liquors in all parts of the World and has shipped its product from Walkerville, Ontario (opposite Detroit) through the United States to foreign countries sending the same through the United States in bond under provisions of the United States Statutes and the Treaty of 1871 between the United States and Great Britain.

(4) }
(5) } These paragraphs quote sections of the Statute
(6) } and the Treaty bearing on the question. They
(7) } are hereinafter quoted.

- (8) Since the Constitutional Amendment and National Prohibition Act, plaintiff has imported nothing into the United States but has continued shipping to foreign countries through the United States by way of the ports of New York, and New Orleans and others. Plaintiff now has bona fide orders for more than forty thousand cases, of the value of more than \$300,000.00, from residents and dealers

South America, Central America, Europe, Asia and Africa and intends to continue to ship through the United States, if permitted to do so. That such shipments have been without abuse in the past and that the loss from such shipments in the past has been negligible, giving details.

(9) These paragraphs set forth the seizure by the defendants of a certain shipment to a customer in Mexico, and threatened seizures of all such proposed shipments and refusal to accept further shipments for transportation in bond.

(10) } (11) } (12) } The Federal Prohibition Director refuses to grant any permits to trans-ship in bond from one foreign country to another.

(14) Plaintiff tendered a shipment of 600 cases in accordance with the Statutes and Regulations for Trans-shipment in Bond, to defendant, Lawson, destined to Guatemala in due course of business, but defendant, Lawson, refused to permit the same and threatened to seize and forfeit it unless a permit was obtained from the Federal Prohibition Director; and the Federal Prohibition Director thereupon refused such permit.

(15) That plaintiff is in fear of criminal prosecutions under the National Prohibition Act, as well as proceedings to forfeit the goods if it attempts any further such shipments.

(16) Plaintiff is advised that under the Legislation of the United States and the Treaty aforesaid, it is entitled to continue such practice.

(17) That said practice continued after the 18th Amendment and the Volstead Act went into operation on the 16th January, 1920, down to the present time, without interruption or interference until the seizures before mentioned, and that the privilege had never been abused or used as a cover for smuggling into the United States; but on the contrary Mr. George W. Ashworth, Chief of the Customs

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Division of the Treasury Department having charge of these matters for the Treasury for years past, expressly declared to the Attorney-General that there had never been any complaint of any such violations and none such had occurred so far as known. Further, that no claim had ever been made by the Prohibition Enforcement Officers of any such violations or that the further exercise of the privilege would result in introducing liquors into the United States in violation of the 18th Amendment. That just before the Amendment to the Volstead Act became effective this question was given due consideration "by the Legal Departments of four different branches of the Government namely, the attorneys for the Prohibition Unit of the Internal Revenue Department of the Treasury; the attorneys for the Customs Division of the Treasury; the Counsel for the United States Railroad Administration (the railroads then being operated by the Government); and finally the General Solicitor for the Treasury Department, Judge Becker, all of whom rendered their opinions that the practice was not in violation of either the 18th Amendment or the Volstead Act."

(18) That defendant, Lawson, unless restrained will dispose of the shipment heretofore seized and plaintiff will be deprived of its property without due process of law. That the Acts and doings of the defendants committed threatened and apprehended as set forth are in violation of the Statutes and Constitution of the United States and in violation of the Treaty above mentioned.

(19) That if deprived of the privilege aforesaid, large part of the valuable business of the plaintiff will be destroyed and the damage will be irreparable.

(20) The amount involved exceeds \$3,000.00 exclusive interest and costs. Details of its business, amounts, etc. in foreign countries, given herein. That it will be necessary to incur much greater expense, and great delay to ship first to Europe and then to these foreign countries.

(21) Prayer for relief. That defendants be restrained from the conduct aforesaid; be compelled to return the shipment seized; that the defendants be restrained from enforcing upon the plaintiff or its goods any of the pains, penalties or forfeitures under the National Prohibition Act when being offered for trans-shipment in bond, and that defendant be enjoined from arresting or prosecuting the plaintiff or its officers or agents for such acts, etc.; and that defendants and other officials of the Treasury be permanently enjoined from interfering with trans-shipment in bond, etc.

The Defendants, In Answer to Order to Show Cause, Moved to Dismiss Bill of Complaint, Because:

There is no equity in the bill.

That the National Prohibition Act and Regulations thereunder forbid such trans-shipment of whisky.

That the treaty of 1871 is abrogated by the National Prohibition Act and the 18th Amendment.

A STIPULATION was made by counsel that "the whisky in controversy was and is intended for consumption as average whisky, but the plaintiff does not admit the materiality of the manner of the use thereof."

AN ANSWER was filed, after the oral argument, but before decree. It is printed in record, pages 16 to 18. It admits practically all of the allegations of the bill and takes issue almost wholly on questions of law. Not denying the allegations of the bill that there has been no abuse of the privilege in the past the answer prophesies about the future as follows (paragraph 21), if such shipments are made as prayed:

"That said cars may be entered by violators of the law and said whisky removed while in the United

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States; that the cars in which whisky is shipped are not proof against thieves and that large quantities of merchandise are stolen from interstate shipments of all kinds of merchandise and that cars containing whisky may be easily entered by the breaking of the seals and the contents removed en route through the United States, except where detectives accompany said shipments, and even in such cases losses have been and will be sustained."

The Decision.

The Learned District Judge, in a most logical, illuminating and concise opinion (Rec., p. 20), covered each point raised and held that the Treaty and Statutory Provisions giving the privilege of trans-shipping in bond were not repealed by the 18th Amendment or the National Prohibition Act. He said:

"What warrant, then, is there for ascribing to Congress a purpose * * * to prohibit the shipping of liquor not intended for, or capable of, use for beverage or any other purpose in the United States, and transported, not into, but through the United States (*United States v. Gudger*, 249 U. S., 373, 63 L. Ed. 653; *McLean v. Hager*, 31 Fed., 602), in accordance with a treaty then in existence and not expressly abrogated or otherwise mentioned in the statute which is claimed to have indicated such a purpose * * * I am of the opinion that the National Prohibition Act does not indicate any intention to forbid the conveyance of intoxicating liquors in transit in bond from Canada through the United States to foreign countries under the provisions of the Treaty and Statute authorizing such conveyance, and pursuant to proper rules and regulations by the executive officials having charge thereof."

Accordingly a decree was rendered granting the relief prayed (Rec., p. 26).

I.

The Constitutional Provision
And Statutes to be Considered
Are as Follows:

The Eighteenth Amendment to the Constitution, which has an important bearing on this question, reads as follows:

"Sec. 1. After one year from the ratification of this article, the manufacture, sale or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territories subject to the jurisdiction thereof, for beverage purposes, is hereby prohibited."

The statute authorizing such shipments in bond is Section 5690 of the United States Compiled Statutes of 1916 (adopted 1900), which is 3005 of the Revised Statutes. It reads as follows:

"All merchandise arriving at any port of the United States destined for any foreign country may be entered at the custom house and *conveyed in transit through* the territory of the United States without the payment of duties under such regulations as to examination and transportation as the Secretary of the Treasury may prescribe."

The new "NATIONAL PROHIBITION ACT" contains several sections to be considered.

Title II, Sec. 3, reads as follows:

"Sec. 3. No person shall on or after the date the 18th amendment to the constitution of the United States goes into effect manufacture, sell, purchase, transport, import, export, deliver, furnish or possess any intoxicating liquor, except as authorized in this

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act, and all the provisions of this act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented."

Title II, Sec. 6:

"No one shall manufacture, sell, purchase, transport or prescribe without first obtaining a permit from the Commissioner so to do, except that a person may without a permit, purchase and use liquor for medicinal purposes." * * *

Title II, Sec. 35:

"All provisions of law that are inconsistent with this act are repealed only to the extent of such inconsistency, and the regulations herein provided for the manufacture or traffic in intoxicating liquor shall be construed as in addition to existing laws."

Title III, Sec. 20:

"That it shall be unlawful to import, introduce, into the canal zone or to manufacture, sell, give away or dispose of, transport or have in ones possession or under ones control within the canal zone, any alcoholic * * * or spirituous liquors * * * providing that this section shall not apply to liquor in transit through the Panama Canal or on the Panama Railroad."

A section of the war time Prohibition Act reads as follows:

"After the approval of this act, no distilled malt vinous, or other intoxicating liquors shall be imported into the United States during the continuance of the present war until the period of demobilization, provided that this provision against importation shall not apply to shipments en route to the United States at the time of the passage of this act."

*U. S. Comp. Stat., 1916, Supp. of 1919, Vol. I, page
796, Sec. 3115-11 12gg.*

II.

The Treaty Provision.

Article XXIX of the Treaty between the United States and Great Britain, concluded at Washington, May 8, 1871, is important. That article so far as material, reads as follows:

"It is agreed that for the term of years mentioned in Article XXXIII of this treaty goods, wares, or merchandise arriving at the ports of New York, Boston and Portland, and any other ports in the United States which have been or may from time to time be specially designated by the President of the United States, and destined for Her Britannic Majesty's possessions in North America, may be entered at the proper custom-house and conveyed in *transit*, without the payment of duties, through the territory of the United States, under such rules, regulations, and conditions for the protection of the revenue as the Government of the United States may from time to time prescribe; and under like rules, regulations and conditions goods, wares or merchandise, from such possessions through the territory of the United States for export from the said ports of the United States."

The Importance of the Treaty Provision may be stated as follows:

It is not contended by us that Congress, notwithstanding this treaty provision could not pass an act prohibiting the transportation through the country of certain specified British or Canadian goods, which Congress chose to designate as deleterious or injurious to the interests of people

of the United States, as for illustration, opium or poisons but it is contended that when a practice has long existed under the treaty, of transporting goods which are recognized as legitimate subjects of commerce by England and her dominions (and which have hitherto always been recognized as legitimate subjects of interstate commerce by our Supreme Court, 223 U. S., 70, 82), and it is claimed that certain new legislation of Congress operates to prohibit such practice then such interpretation of the new legislation will prevail as will permit the continuation of the practice, *unless it is clear that it was the intent of Congress to prohibit it, and that the two cannot stand together.*

**The Bill Alleges a Case
Under the Treaty.**

The Government brief (page 36) makes a point (one not made or claimed below) that our bill of complaint does not make proper allegations to bring the case within Article 29 of the Treaty. This point is made because the special particular shipment that was seized was going to Mexico and there is no allegation in the bill that the President of the United States, under Article 29 of the Treaty, has designated the particular port of exit as one of the ports to come under Section 29, which recites:

“Ports of New York, Boston and Portland, and any other ports in the United States which have been or may from time to time be specially designated by the President of the United States.”

It is true that there is no special allegation about the President having designated other ports, but the allegations of the bill are very broad, showing that plaintiff was engaged in shipping from the port of New York and other ports of the United States, under the treaty, and was constantly engaged in such shipments, and that the defendant's acts were depriving plaintiff of its rights under the treaty in that behalf. The allegations of the bill (which are found

by the court below to be true) on this subject, are contained in subdivisions of the bill numbered III (Rec., p. 2), VIII (Rec., pp. 3, 4), XII (Rec., p. 6), XVI (Rec., p. 7), XVII (Rec., p. 7), XVIII (Rec., p. 8).

It is unnecessary to quote them here. It will be found upon examination that they are broad allegations alleging the facts covering the treaty rights and claiming such rights.

Such technical objection will not be entertained here, when not made or called to the attention of the court below.

San Juan Co. v. Requena, 224 U. S., 97.

Brown v. Gurney, 201 U. S., 190.

Grant Bros. v. United States, 232 U. S., 661.

Campbell v. United States, 224 U. S., 106.

Charlotte v. Atlantic Co., 228 Fed., 463.

*THAT ART. 29 OF THE TREATY IS STILL IN FULL
FORCE, SEE APPENDIX, PAGE 1.*

III.

**Some Facts About This Practice
Are Important.**

It has prevailed for a great many years without abuse.

It prevailed all during War Time Prohibition. It was the deliberate opinion of the legal officers of the Treasury that it was not within the prohibition of that statute, hence it continued during that period, without abuse.

Just before the National Prohibition Act went into effect this question was considered by the law officers of four different departments of the Government and it was the unanimous opinion of all those lawyers, about seven in number, that the new act did not prohibit this practice (Rec., p. 8). They were the law officers of the Prohibition Unit, the law officers of the Customs Division of the Treasury, the Counsel of the Railroad Administration of the Government (the railroads were then under Federal control), and finally the General Solicitor of the Treasury Judge Becker. All were of the opinion that the new act did not interfere with the "transit in bond" practice.

The practice continued under National Prohibition and has continued until the present time.

It so continued without abuse, that is without in any way being used as a cover for smuggling the goods into the United States. There has been no evil arising from it at any time, either before or during war time prohibition or under national prohibition, and no claim of such has at any time been made. And the Chief of the Division having charge for years past of such shipments so declared on the hearing to the Attorney-General (Rec., p. 8). There have been some thefts, as in other kinds of merchandise, but they have been negligible (Rec., p. 4).

No Danger of Violation
of the Privilege.

All goods arriving for "transit in bond" are immediately declared and placed in charge of the Treasury Officials, and are conveyed across the country under such regulations to prevent their escape into the Country as the Treasury may choose to adopt. They may be as stringent as the Secretary desires to impose, and there is therefore not the slightest reason for giving this act an interpretation based upon the idea that the privilege may be used as a cover for smuggling. The Court, we submit, will act upon the opposite theory. Therefore, we have here a case which is not within the evil to be remedied by the Eighteenth Amendment and the Volstead Act. The allegations in the bill show that there had been no abuse of this practice and that there had been no complaint by the Prohibition Officials of any such violations or threatened violations (Rec., pp. 4, 8).

The language of Mr. Justice Holmes in the *Taylor case*, relating to the landing of aliens is pertinent. The language of the Statute forbade all "landing" except as designated by Immigration Officers, but this was held not to prohibit alien sailors from going ashore at other ports and places. The learned Justice said:

"If we reject the ambiguous interpretation of 'to land' as we have, the necessary result can be reached only by saying that the section does not apply to sailors carried to an American Port with the bona fide intent to take them out again when the ship goes on, when not only there was no ground for supposing that they were making the voyage a pretext to get here, desert and get in, but there is no evidence that they were doing so in fact."

Taylor v. U. S., 207 U. S., page 125.

So in *U. S. v. 85 Cattle*, where cattle, belonging to a resi-

dent of Canada, strayed over the National Boundary into the United States, the Court said:

"True such straying (into the country) may afford opportunity to the owner to defraud the revenue in that he may, if the strays escape notice, secretly sell or merge them in property here—in effect 'import' them without paying duty. This danger, however, cannot affect the construction of the law. Vigilance or new legislation may guard against it."

U. S. v. 85 Cattle, 205 Fed., 681.

So it was pointed out by Mr. Justice Clarke, in the *Street case*, that the administrative power conferred upon the Treasury was sufficient to preclude liquors escaping into the body of the Country. He said:

"Clearly there is like administrative power under the Act to so regulate the transfer of such stored liquors from the warehouse to the dwelling of the owner as to prevent their being used to evade the prohibitions of the Act or to substantially interfere with its effective enforcement."

Street v. Lincoln Co., 254 U. S., 93.

The Act provides for Treasury Regulations for the transporting of liquors within the United States, for medicinal purposes. There is no more reason for the escape of the liquors for general use in violation of the Act, in one case than in the other. The Court will act upon the distinct and clear assumption that in either case there will be a violation of the privilege.

IV.

Repeal of Statute**By Implication:**

It is clear from the statutes above quoted that there is no express repeal of Section 5690. The question arises whether there is a repeal by implication, so far as liquors are concerned.

Repeals By Implication Are Not Favored.

The inconsistency must be clear and explicit.

Ex parte Webb, 225 U. S., 683.

Washington v. Miller, 235 U. S., 428.

Ex parte U. S., 226 U. S., 420.

U. S. v. Lee, 185 U. S., 221, 222.

In *Ex parte Webb*, *supra*, the Supreme Court of the United States, speaking by Mr. Justice Pitney, states the rule as follows:

"But it is a settled rule of statutory construction that repeals by implication are not favored and will not be held to exist if there be any other reasonable construction." Citing other cases, decided by the Supreme Court of the United States.

Note 1: We beg to say to this Court that no concession by counsel for appellee was made in the court below as to the construction of the Amendment or the Volstead Act different from our contentions made herein, as might be inferred from the statement of counsel in the Government brief at page 16. The same brief as this one in all substantial points was filed by us below, and our bill of complaint speaks for itself on this subject (Rec., pp. 4, 7, 8), and our oral arguments below were strictly in accord therewith.

Note 2: All italics ours, unless otherwise noted.

In Washington v. Miller, supra, the Supreme Court of the United States says:

"In these circumstances we think there was no implied repeal and for these reasons; First, such repeals are not favored and usually occur only where there is such an irreconcilable conflict between an earlier and later statute that effect can not be reasonably given to both (citing decisions); second, where there are two statutes upon the same subject, the earlier being special and the latter general, the presumption is in the absence of an express repeal or an absolute incompatibility that the special is intended to remain in force as an exception to the general (citing decisions); and third, there was in this instance no irreconcilable conflict or absolute incompatibility for both statutes could be given reasonable operation if the presumption just named were recognized."

In ex parte United States, supra, the court said:

"When the use is thus narrowed, solution is readily reached by the application of the *elementary rule* that a special and particular statutory provision affording a remedy for particular and specific cases is not repealed by a general law, unless the repeal be express or the implication to that end be irresistible."

In U. S. v. Lee, supra (page 221), the Court in discussing repeal by implication of one statute by another, says:

"The rule is well established that effect must be given to both, if by any reasonable interpretation that can be done; that there must be a *positive repugnancy* between the provisions of the new laws and those of the old laws; and even then the old law is repealed by implication only *pro tanto* to the extent of repugnancy; and if harmony is impossible, as

only in that event, the former is repealed in part or in whole as the case may be."

The Supreme Court in the same case stated that the same rules apply where it is claimed that repeal by implication was by a treaty (page 222).

"But the later statute does not in terms repeal the former, *and presumably both stand if there is anything for them to operate upon.* The later statute must be shown to be repugnant to the former to repeal it or any portion of it."

Marks v. U. S., 196 Fed., 478.

In the case now under consideration there is no inconsistency between section 5690, permitting trans-shipments through the territory of the United States from one foreign country to another, and the new National Prohibition Act, which aims to prevent the manufacture and sale and in part the use of intoxicating beverages *within* the United States. Both may stand and be enforced.

War time prohibition was in force, but shipments in bond from one foreign country to another went on just the same. The latter practice did not interfere with the former, and the same condition has existed under the National Prohibition Act for more than two years.

This being unquestionably so, it would seem plain under the authorities that Section 5690 is not repealed as to liquors by the new act.

V.

Repeal of Treaty Rights:

The right of transit was conferred not only by the Treaty, but the privilege was extended also by the statute. Even if Congress might without much thought or compunction repeal a Statutory provision, nevertheless, the same Congress would hesitate a long time before overthrowing a Treaty obligation.

No doubt Congress may pass a law breaking down this Treaty, *pro tanto*, and withdrawing the rights which have so long obtained under it.

U. S. v. Lim, 176 U. S., 464.
U. S. v. Lee, 185 U. S., 221

But the intent to do so must be *clear* and *unequivocal*. The act must not be capable of two interpretations. The new legislation must clearly and explicitly negative the Treaty right.

Such Treaty provisions will not be held to be repealed in whole or in part, unless it be perfectly clear that the Treaty provision and the new Statute are repugnant and that both cannot stand.

Our Supreme Court has repeatedly declared that Treaty rights should be regarded as inviolable and not be held to be impaired by subsequent legislation unless the intention of Congress is perfectly clear.

Chew Heong v. U. S., 112 U. S., 549, 540.
Frost v. Wenie, 157 U. S., 59.
U. S. v. Lim, 176 U. S., 465.
U. S. v. Lee, 185 U. S., 221.
Johnson v. Browne, 205 U. S., 521.

In *Chew Heong v. U. S., supra*, the Court said:

"The Court cannot be unmindful of the fact that the honor of the Government and people of the United States is involved in every inquiry whether rights secured by such (treaty) stipulations shall be recognized and protected" (page 540).

"For, since the purpose avowed in the act was to faithfully execute the treaty, any interpretation of its provisions would be rejected which imputed to Congress an intention to disregard the plighted faith of the government, and, consequently, *the court ought, if possible, to adopt that construction which recognized and saved rights secured by the treaty.* The utmost that could be said, in the case supposed, would be, that there was an apparent conflict between the mere words of the statute and the treaty, and that, by implication, the latter, so far as the people and the courts of this country were concerned, was abrogated in respect of that class of Chinese laborers to whom was secured the right to go and come at pleasure. *But, even in the case of statutes, whose repeal or modification involves no question of good faith with the government or people of other countries, the rule is well settled that repeals by implication are not favored, and are never admitted where the former can stand with the new act*" (page 549).

In *Frost v. Wenie, supra*, the court said:

"It is well settled that repeals by implication are not to be favored. * * *

No trace can be discovered in the various legislative enactments relating specifically to the Osage trust lands of any intention, upon the part of Congress, to disregard the terms of its treaties with the Osage Indians; and, consequently, the act of December 15, 1880, should not be construed as impairing

the rights of the Indians, unless such a construction be unavoidable."

In *U. S. v. Lee, supra*, the Court said:

"When the two (treaty and statute) relate to the same subject, courts will always endeavor to construe them so as to give effect to both if that can be done without violating the language of either; but if the two are inconsistent, the one last in date will control. * * * Nevertheless, the purpose by Statute to abrogate a treaty or any designated part of a treaty or the purpose by treaty to supersede the whole or part of an act of Congress must not be lightly assumed, but must appear clearly and distinctly from the words used."

In *U. S. v. Lim, supra*, the Court said:

"We ought, therefore, to so consider the act, if it can reasonably be done, as to further the execution and not violate the provisions of the treaty."

In *Johnson v. Browne, supra*, the court said:

"Repeals by implication are never favored, and a later treaty will not be regarded as repealing an earlier statute by implication, unless the two are absolutely incompatible and the statute cannot be enforced without antagonizing the treaty. If both can exist, repeal by implication will not be adjudged."

VI.

Forbidding "Through Transit"
Not Within the Spirit
or Purpose:

THE QUESTION PRESENTED IS, THEN, whether the new act, by virtue of its terms forbidding broadly the importing and transporting of liquors, was intended to and does repeal, as to liquors, the first above quoted statute expressly authorizing trans-shipments through the United States from one foreign country to another, and operates as a repeal or abrogation of Clause 29 of the Treaty as to this subject of commerce.

IT CERTAINLY IS NOT WITHIN THE SPIRIT OR PURPOSE of the act, which is expressly specified in Section 3 above quoted, to be "to the end that the *use* of intoxicating beverages may be prevented."

No one will question that this means the use of liquor as a beverage *within the United States*, and that the legislation has no reference whatever to foreign countries or to the use of liquors in foreign countries.

In *United States v. Palmer*, hereinafter quoted, Chief Justice Marshall makes it clear that general words of this character must be limited to cases within the jurisdiction of the Legislative body passing the act. He says:

"General words must not only be limited *to cases within the jurisdiction of the State*, but also to those objects which the legislature intended to apply them It would seem that offenses against the United States, not offenses against the human race, were the crimes which the Legislature intended by this law to punish."

Mr. Justice Holmes declares the same rule in *American Banana Co. v. United Fruit Co.*, 213 U. S., 347.

Therefore, the purpose of the Eighteenth Amendment and of the act being to prohibit the use as a beverage within the United States, it is plain that the prevention of *SHIPPING THROUGH IN BOND*, duly sealed up and beyond the possibility of being used in the United States is not within the spirit or purpose of either the Constitution or the Act.

VII.

Not Being Within the Spirit or Purpose of the Act, the Act Will Not be Construed to Include the Case:

- Faw v. Marstellar*, 2 Cranch., 10.
Taylor v. United States, 207 U. S., 120.
Holy Trinity Church v. United States, 143 U. S., 457, 459.
American Security Co. v. District of Columbia, 22 U. S., 491, 495.
Lau v. United States, 144 U. S., 47, 61.
United States v. Palmer, 3 Wheat., 610.

In *Faw v. Marstellar*, *supra* (opinion by Chief Justice Marshall), it was very early held by the Supreme Court of the United States that:

“Where a case is shown to be out of the mischief intended to be guarded against or out of the spirit of the law, the letter of the statute will not be deemed so unequivocal as absolutely to exclude another construction.”

In *Taylor v. United States*, *supra*, the statute forbade the “landing” of aliens in the United States except at certain places designated by immigration officers. The

was held not to prohibit sailors from going ashore while their vessels were in port at other ports and places than those designated by the immigration officials. Such landings were held not to be within the spirit or intent of the act.

In this case Mr. Justice Holmes (at page 125) said:

"'Landing from such vessel' takes places and is complete the moment the vessel is left and the shore reached. But it is necessary to commerce, as all admit, that sailors should go ashore, and no one believes that the statute intended altogether to prohibit their doing so. The contrary always has been understood of the earlier acts, in judicial decisions and executive practice. If we reject the ambiguous interpretation of 'to land,' as we have, the necessary result can be reached only by saying that the section does not apply to sailors carried to an American port with a *bona fide* intent to take them out again when the ship goes on, when not only there was no ground for supposing that they were making the voyage a pretext to get here, desert and get in, but there is no evidence that they were doing so in fact."

207 U. S., page 125.

In *Holy Trinity Church v. United States, supra*, the Court said:

"IT IS A FAMILIAR RULE THAT A THING MAY BE WITHIN THE LETTER OF THE STATUTE AND YET NOT WITHIN THE STATUTE BECAUSE NOT WITHIN ITS SPIRIT NOR WITHIN THE INTENTION OF ITS MAKERS. This has been often asserted, and the reports are full of cases illustrating its application. This is not the substitution of the will of the judge for that of the legislator, for frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results

which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act. * * * The object designed to be reached by the act must limit and control the literal import of the terms and phrases employed."

The court in this case cites a great many cases and illustrations of the rule to which we respectfully invite attention.

Among other things, Mr. Justice Brewer said:

"Another guide to the meaning of a statute is found *in the evil which it is designed to remedy*, and for this the Court properly looks at contemporaneous events, the situation as it existed, and as was pressed upon the attention of the legislative body" (page 463).

The concluding language of the opinion is as follows:

"It is a case where there was presented a definite evil, in view of which the legislature used general terms with the purpose of reaching all phases of that evil, and thereafter, unexpectedly, it is developed that the general language thus employed is broad enough to reach cases and acts which the whole history and life of the country affirm could not have been intentionally legislated against. It is the duty of the courts, under those circumstances, to say that however broad the language of the statute may be, *the act although within the letter, is not within the intention of the legislature, and, therefore, cannot be within the statute.*"

In *American Security Company v. District of Columbia* *supra*, the question was whether the Supreme Court of the United States had jurisdiction to review a judgment of the court of appeals of the District of Columbia. Jurisdiction

tion is given by the United States statute in all cases in which " * * * Sixth, in cases in which the construction of any law of the United States is drawn in question."

The Supreme Court of the United States held that it would not apply to the *local* laws of the District of Columbia, but only to laws of general application. In deciding the case, Mr. Justice Holmes said:

"A well-known example of construing a statute not to include a case that indisputably was within its literal meaning, but was believed not to be within the aim of Congress, is *Holy Trinity Church v. United States*, 143 U. S., 457. * * * In the case at bar if the words, 'construction of any law of the United States,' are confined to the construction of laws having general application throughout the United States, the jurisdiction given to this court is confined to what naturally and properly belongs to it."

Again, the court said:

"Of course, there is no doubt that the special act of Congress was in one sense a law of the United States. It well may be that it would fall within the meaning of the same words in the third clause of the same section: 'Cases involving the constitutionality of any law of the United States.' But it needs no authority to show that the same phrase may have different meanings in different connections."

In *Lau v. United States, supra*, a Chinese merchant who had lived in the United States for fifteen years and gone back to China, stayed a period of time, and then upon attempting to return to the United States, failed to get the proper identification certificates from the Chinese Government, and he was excluded by the local officers in San Francisco under the Immigration Act. The general terms of the law plainly forbade his entry, but the Supreme Court of the United States held that he was entitled to enter

under the rule that the statute must be construed *in the light of the evil to be remedied*. Notwithstanding, he was within the letter, his case was not within the spirit. The Court said:

"But Chinese merchants domiciled in the United States, and in China only for temporary purposes, *animo revertendi*, do not appear to us to occupy the predicament of persons 'who shall be about to come to the United States,' when they start on their return to the country of their residence and business. The general terms used should be limited to those persons to whom Congress manifestly intended to apply them."

In *United States v. Palmer, supra*, the statute to be construed reads:

"*If any person shall commit upon the high seas murder or robbery or any other offense which, if committed in the body of a county would by the laws of the United States be punishable by death, etc., such person shall upon conviction thereof suffer death.*"

Palmer and others were indicted in Massachusetts for piracies committed on the high seas outside the jurisdiction of any county. The question arose, stated by Chief Justice Marshall, as follows:

"Do the words of the Act authorize the courts of the union to inflict its penalties on persons who are not citizens of the United States, nor sailing under their flag, nor offending particularly against them?"

The words of the section are in terms of unlimited extent. The words 'any person or persons' are broad enough to comprehend every human being. But *general words must not only be limited to cases within the jurisdiction of the state*, but also to those objects to which the legislature intended to apply them. * * *

It would seem that offences against the United States, not offences against the human race, were the crimes which the legislature intended by this law to punish. • • *

But these words must be limited in some degree, and the intent of the legislature will determine the extent of this limitation. For this intent we must examine the law."

VIII.

The Language of the Constitutional Amendment Throws Strong Light Upon This Question: Not an "Importation into": Not an "Exportation from": Not a "Transportation Within."

The basis of the entire legislation (as shown by title II, Sec. 3 of the Act and by the Street and other decisions) is the constitutional amendment and it is not believed that legislative intent to go beyond it or outside of its terms and spirit will be found by mere implication, even if such action would be constitutional.

The significant phrases of the constitutional amendment as to this question are:

"The transportation of liquors within" the United States is forbidden.

"The importation thereof into" the United States is forbidden.

"The exportation thereof from" the United States is forbidden.

Not an "Importation Into."

By a narrow interpretation of the words "the importation into the United States," it might be said that the bringing into the United States for trans-shipment through

the United States was an "importation" but, such interpretation is inadmissible under opinions of the Attorney-General in force for many years, and under the decisions.

Years ago it was held by the Attorney-General of the United States, *that to thus bring into the country with intent to immediately export them is not an importation* within the meaning of the law.

In 1909 Attorney-General Wichersham ruled that:

"The entering of merchandise for immediate export and without any intent that it shall enter into the commerce of the country is not an importation."

Opinions of Attorney-General, Vol. 27, page 440.

In M'Lean v. Hager, opium was shipped at Honolulu (then a foreign port) to Panama by way of San Francisco. At San Francisco it had to be transferred to another steamer. It was reported to the Collector at San Francisco as being in transit for Panama, and permit for the transhipment was applied for: The goods were seized by the Collector. It was held not to be an importation. The court said:

"It was never intended to be brought into the United States for consumption or sale. It was never intended to enter into the commerce of the Country. *It was not imported into the United States in any proper sense of the term.* It was shipped from one foreign port to another by way of San Francisco simply because there was no other convenient means of forwarding it to its destination. It purported on the ship's manifest and in the bill of lading to be shipped from Honolulu to Panama and to be only in transit and it was so reported to the Collector. We cannot attribute to Congress an intention to place so important an obstruction upon the commerce of friendly neighbors—a partial confiscation of the property of their citizens—without a more explicit

expression of such intent than is found in any provision of the Statutes brought to our notice."

M'Lean v. Hager, 31 Fed., 602, 604, 605.

Subsequently, in 1914, Congress passed a special act expressly forbidding the conveyance of opium from one foreign country to another through the United States, or the trans-shipment thereof. 38 Stat. at large, page 276. This is significant when we realize that the "importation" of opium had been previously forbidden (35 Stat. L., 614).

Other cases showing that the bringing into the country with intent to immediately convey to another foreign country, is not "an importation," are:

The Conqueror, 166 U. S., page 115.
U. S. v. 85 Head of Cattle, 205 Fed., 679.
The Concord, 9 Cranch., 387.

In "*The Conqueror*," *supra*, a citizen of the United States purchased in a foreign country a yacht, and in the course of his travels brought her within the waters of the United States. The Customs Collector claimed it was an importation and seized her for duties. The court held otherwise, and among other things said:

"If she be dutiable at all, it must then have been because she was bought by an American citizen. But why should this make her dutiable? She is not imported, or taken into the country in the ordinary sense in which that term is used with reference to other articles—does not become commingled with the general mass of property, and is employed precisely as she might be legally employed by her foreign owners, or by an American citizen leasing her from such owner. Other articles are dutiable, not because they have been purchased, but because they are actually imported and become the subject of sale and commerce within the country."

**Not An "Exportation From"
the United States.**

Like the word "importation," the word "exportation" has a definite, well-understood, legal and commercial signification. It is directly the opposite of "importation."

Kidd v. Flagler, 54 Fed., page 369, and authorities cited.

All of the cases in this subdivision above cited, showing that the receipt of goods from abroad to be carried across the country to another foreign country, is not an "importation," are also direct authorities that the sending out of the same goods is not "an exportation."

The literal meaning of the word "export" may be said to be "to carry out," but in common parlance and legal signification it means something more than that.

It has been defined by our Supreme Court in adopting a definition previously adopted by Attorney-General Brewster:

Swan v. U. S., 190 U. S., 143.
17 Op. Attorney-General, 583.

In *Swan v. U. S.*, *supra*, it was held that oils purchased in the United States for use upon vessels sailing in the foreign trade, carried on to such vessels and taken from the port of the United States, was not an "exportation." In that case Mr. Justice Brewer said:

"Whatever primary meaning may be indicated by its derivation, the word 'export' as used in the Constitution and Laws of the United States, generally means the transportation of goods from this to a foreign country. 'As the legal notion of emigrating is a going abroad with an intention of not returning so that of exportation is a severance of goods from

the mass of things belonging to this country with an intention of uniting them to the mass of things belonging to some foreign country or other.''"

Not a "Transportation Within."

It seems to us that having in mind the intent and purpose of the Constitution and the law, it can justly be said that this practice now under consideration is no more a "transportation within" the United States than it is "an importation into" or "an exportation from" the United States. The common sense construction and the purpose and object of the constitution and the law unite in placing this practice outside the purview of the new legislation.

In *United States v. Gudger*, the Supreme Court of the United States held:

"The Reed amendment prohibiting transportation of liquor in interstate commerce '*into*' any state which prohibits the manufacture, etc., does not include the movement *through* such state into another state."

In the opinion, Mr. Chief Justice White, said:

"We are of the opinion that there is no ground for holding that the prohibition of the statute against transporting liquor in interstate commerce '*into* any state or territory the laws of which state or territory prohibit the manufacture' includes the movement in interstate commerce *through* such a state to another state."

This is a very plain holding that "*transportation within*" does not necessarily include transportation *through* from one foreign country to another foreign country.

United States v. Gudger, 249 U. S., 373 (May 1919).

A reading of the opinion in the *Gudger case* will satisfy that the reasoning is applicable to the case now under discussion. Virginia prohibited the manufacture or sale of intoxicating liquors for beverage purposes. The Reed amendment provided that "whoever shall cause intoxicating liquors to be transported in interstate commerce, except for scientific, etc., purposes, into any state or territory, the laws of which prohibit the manufacture or sale therein of intoxicating liquors for beverage purposes, shall be punished, etc." The defendant was a passenger from Baltimore, Maryland, to Asheville, North Carolina, and when the train stopped at Lynchburg, Virginia, it was found he had seven quarts of whisky in his valise. He intended going on through Virginia to North Carolina. Chief Justice White said:

"Under this state of facts we think the court was right in reversing the opinion, as we are of the opinion that there is no ground for holding that the prohibition of the statute (Reed amendment) includes the movement in interstate commerce through such state to another. * * *

The suggestion made in the argument that although the personal carriage of liquor through one state is a means of carrying it into another, violates the statute, it does not necessarily follow that the transportation by common carrier through a state for like purposes would be such a violation, because of the more facile opportunity in the one case than the other of violating the law, is without merit."

The Street Case.

The case of *Street v. Lincoln Safe Deposit Company* (decided November 8, 1920, reported 254 U. S. 88) is very illuminative of this case.

The owner of liquor had stored the same in a storage warehouse and intended the same for his own personal

mily use. The only part of the Statute giving him any right to possess it, reads: (Title II, Section 33) "But it shall not be unlawful to possess liquors in one's private dwelling while the same is occupied and used by him as his dwelling only, and such liquor need not be reported provided such liquors are for use only for the personal consumption of the owner thereof and his family residing in such dwelling and of his bona fide guests when entertained by him therein; and the burden of proof shall be upon the possessor in any action concerning the same to prove that such liquor was legally acquired, possessed and used."

It was *held* he not only had a right to possess it when in his private dwelling but when he had it in his compartment in a public warehouse; and also it was held that he had a right to *transport* it from the warehouse to his private dwelling, although on the face of the statute all transportation was forbidden.

The case goes further than the requirements of the case at bar.

It holds that the law was passed to enforce the Eighteenth Amendment and must be considered with reference to that purpose, and also that all the provisions must be construed with respect to the intent of the Constitution and the Statute.

It holds that the possession of the warehouse company (such as it was) was not within the purpose of the Act, and that notwithstanding the general and sweeping clauses against any transportation, the right of the individual citizen to possess the same in his private dwelling for his private consumption carried with it the right to have it in a public warehouse and to transport it thence to his home, for his private consumption.

A Conclusion.

We submit that the conclusion from the foregoing adjudications is just, reasonable and logical, *that this practice is not either "an importation into," an "exportation from or "transportation within" the United States, but is separate and distinct act, a fourth act, recognized by the statutes and in Congressional and departmental proceedings since 1866 as "conveyance in transit" or "transit in bond."* (See the history of Sec. 5690 in Vol. 5 U. S. C. I. 1916, and the debates and opinions referred to in the appendix hereto).

This has been the practical construction adopted by the Government both before and since the adoption of prohibition; and the Treasury continued to enforce the "transit in bond" treaty and statutes after the Volstead Act went into effect, in accordance with the opinions of the legal departments of the four different governmental branches concerned (Rec., p. 8).

IX.**As to Possession.**

But counsel contend (Brief, pp. 21-23), that all "possession" is forbidden by Section 3, and hence this practice banned.

But, not so. Under "conveyance in transit" practice, possession is constructively and actually the possession of the United States, through its customs officers and bonded carriers.

All goods are placed in the custody of the government officials and by them duly sealed, delivered to the bonded agents of the United States, carried through the country

those agents to the port of exit, and there delivered to the local U. S. Customs officials, who break the seals, keep control of the goods to the outbound vessels, and release the same, and then certify back to the port of entry the fact of the delivery of the goods to the outgoing ship and its departure from the country.

The practice is exactly the same as when merchandise comes through the port, say, of New York destined for Cincinnati, St. Louis or any other inland port. It is declared at the Custom House in New York, sealed up and delivered to the bonded carrier, forwarded to the final port of destination and there finally delivered by the United States Customs officials to the consignee. This is known as "immediate transportation without appraisement."

The possession is the possession of the United States.

*U. S. Comp. Laws 1916, Sections 5698, 5699, 5700,
5695.*

Seeberger v. Schweyer, 153 U. S., 612, 613.

Hartranft v. Oliver, 125 U. S., 528, 530.

Harris v. Dennie, 3 Peters, 303-304.

The above statutes and decisions show that the custody and possession of the goods from the time of entry are in the United States officials.

Article 695 of the Treasury Regulations provides, as to goods in transit from one foreign country to another, that:

"Upon the completion of the entry the same procedure will be followed as in the cases of the entry for immediate transportation without appraisement."

Regulations, Ed. 1915, Art. 695.

X.

Panama Canal Provision:

But it is said:

"By expressly excepting transportation through the Panama Canal and on Panama Railroad, it is to be assumed that Congress intended that other through transit should be prohibited."

The rule of construction thus referred to, we submit, has no application to a case like the present. The exception expressed was not in connection with or a part of the sections now being interpreted.

For, Section 20 relating to the Panama Canal was no part of the original act as introduced or reported, but was a special provision, subsequently inserted, dealing with a special subject requiring separate treatment.

Section 20 was inserted as a Senate Amendment after the House had passed the original bill, and it was thrown in near the end of Title III—not in its proper place at all, which would have been in Title II, and was evidently an afterthought, and it was written not by the author of the bill and not in conjunction with the rest of the law.

Title I of the Act covers the further enforcement of "WAR PROHIBITION" and consists of seven sections.

Title II is entitled "*PROHIBITION OF INTOXICATING BEVERAGES*" and consists of 39 sections, twelve closely printed pages, and covers practically the whole subject of prohibition after the date fixed for taking effect of the Eighteenth Amendment, which was January 1, 1920.

Title III, is entitled "INDUSTRIAL ALCOHOL" and consists of eleven sections devoted to Industrial alcohol and contains also some miscellaneous sections of a general character included in which is Section 20, relating to the canal zone.

The misplacing of the section and its history show that was drafted at a different time from the main act, and by different hands, and was intended to cover a subject which was called to attention during the progress of the bill.

It relates only to the Canal zone and touches nothing else. When preparing this the mind of the author of Section 20 would naturally go to the chief business of the canal, namely, *through* business, and when the mind was thus challenged, the committee naturally exempted such *through* traffic because it did not come within the purposes of the act or the constitutional amendment.

On the other hand it is quite evident that the author when preparing the original bill had no thought of the foreign traffic through the United States, perhaps knew nothing about it, as it was insignificant when compared to the general business of the country. Hence, no reference is made to it.

The rule "*expressio unius*" is only an aid to discovering the intent of the author—it is never hard and fast.

U. S. v. Barnes, 222 U. S., 518, 519.

36 Cyc., page 1122.

Dwight v. American Co., 263 Fed., 318.

In *U. S. v. Barnes*, *supra*, the court said:

"The position taken by the defendants in error and sustained by the District Court, is that that extension of particular sections is an implied exclusion of all others. *Expressio unius est exclusio*

alterius. We are unable to assent to that position. The maxim invoked expresses a rule of construction not of substantive law and serves only as an aid in discovering the legislative intent when not otherwise manifest."

In Cyc., supra, it is stated:

"The maxim should be applied only as a means of discovering the legislative intent."

XI.

The Treaty and International Comity:

Conceding that Congress may, notwithstanding the Treaty, prohibit the carriage through the United States of things which are legitimate subjects of commerce among our foreign neighbors, it will not be lightly so concluded, but only in cases where it is clear.

The comity of nations calls for free interchange and exchange of accommodations like this, when no harm can come to us, but only profit in the way of freight to our railroads.

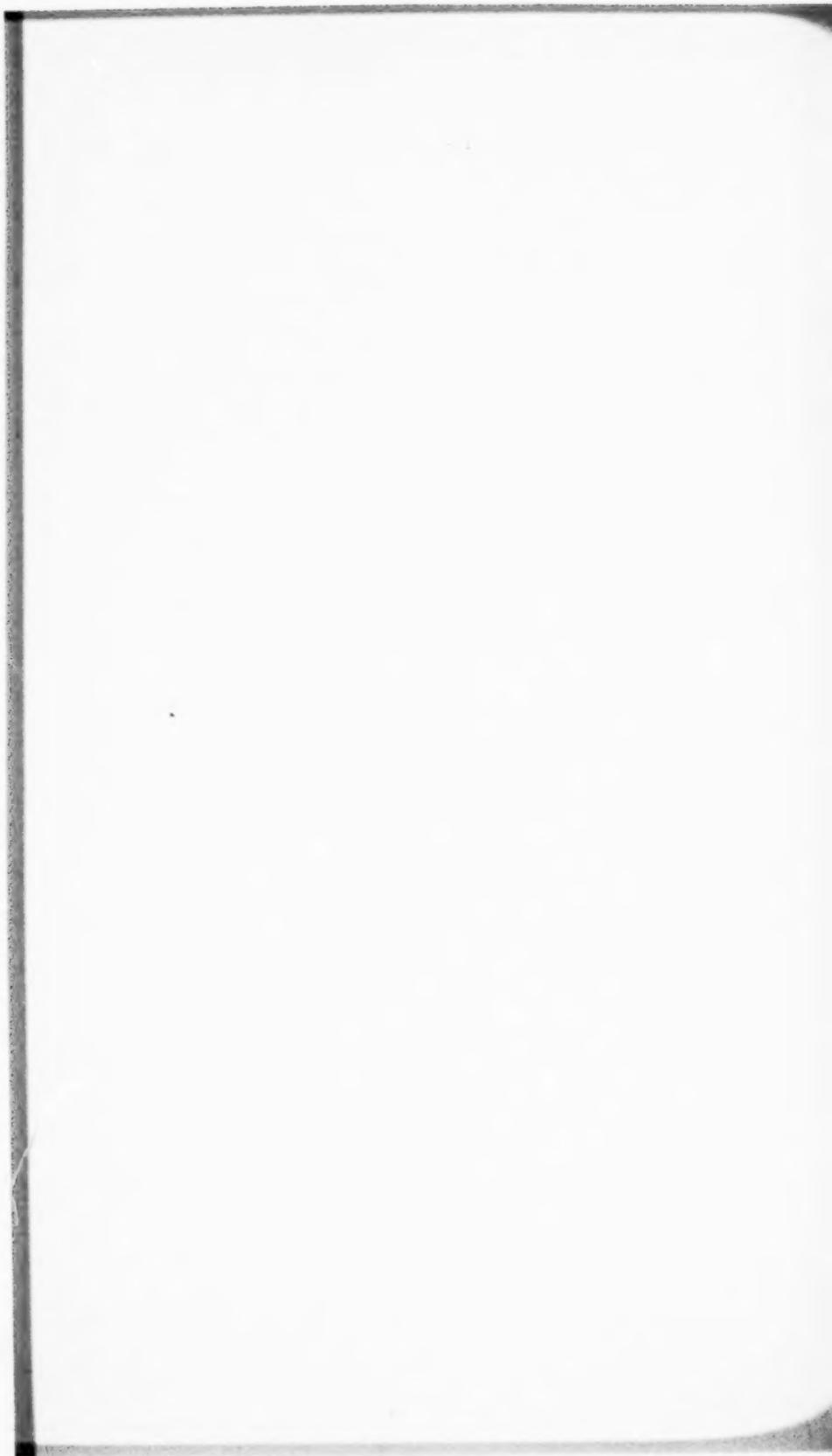
Only when the construction is inevitable should it be held that Congress intended to interfere with or regulate the ordinary daily habits or customs of foreign peoples, or even to affect them indirectly. Our legislation is directed only to the use of the liquors by our own people and people within our territorial limits, and unless the court can say that Congress has plainly prohibited so innocent a practice, namely, transportation in bond (one so helpful to our neighbors), it ought not to be so inferred.

Particularly is this so as to Canada, because there has long existed the utmost reciprocity and interchange of privileges with her. Daily we send hundreds of cars

merchandise of all kinds through various portions of Canada from one part of our country to another, without hindrance and without duty or tariff. On the other hand her citizens highly value the privileges afforded by the Treaty and by this Statute, permitting this practice to continue. Shall it be held arbitrarily and without any good reason whatsoever that certain legislation directed to our own affairs solely, was intended thus indirectly strike at our neighbors?

Respectfully submitted,

Alfred Lucking,
Counsel for Appellee.



APPENDIX.

This Treaty Provision is
still in Full Force:

Article XXIX of the Treaty of 1871 has been acted upon in full force down to the present time; but some question was made thirty years ago as to whether Article XXIX was not abrogated at the same time as Articles XVIII to XV inclusive and Article XXX. No attempt was ever made to abrogate Article XXIX, but it has been argued that by abrogating the others sections, Article XXIX also fell.

Congress by resolution in 1883 gave directions to abrogate the "fisheries" sections (viz. 18-25 and 30), but took great pains both in the House and the Senate to preserve Clause 29.

The proceedings show that fact clearly, as is admitted by President Harrison in his message. His message was sent February 2, 1893, and he states that the practice had been from 1883 to 1893 to regard Article 29 as in force, and to act upon it, and the bill of complaint shows that it has been acted upon as being in full force to the present time. The opinions of such great lawyers as Senator Edmunds of Vermont and Secretary of State Bayard were that Clause 29 was not repealed by the act of 1883, and a close examination of the treaty clauses and of the legislation will confirm this beyond doubt, we think, as in brief form, we will now attempt to show.

By the Treaty with Great Britain concluded at Washington on the 8th day of May, 1871, the United States provided for the transit from Canada to certain ports of the United States, without the payment of duties, of merchan-

dise for export. The material portion of Article XXIX of the Treaty on the subject reads as follows:

"It is agreed that for the term of years mentioned in Article XXXIII of this treaty goods, wares, or merchandise arriving at the ports of New York, Boston, and Portland, and any other ports in the United States which have been or may from time to time be specially designated by the President of the United States, and destined for Her Britannic Majesty's possessions in North America, may be entered at the proper custom-house and conveyed in transit without the payment of duties, through the territories of the United States, under such rules, regulations and conditions for the protection of the revenue as the Government of the United States may from time to time prescribe; and under like rules, regulations and conditions goods, wares, or merchandise may be conveyed in transit, without the payment of duties, from such possessions through the territories of the United States for export from the said port of the United States."

The question whether Article XXIX is still in force depends upon the meaning of the above words, "the term of years mentioned in Article XXXIII."

Article XXXIII provides as follows:

"The foregoing Articles XVIII to XXV, inclusive, and Article XXX of this treaty, shall take effect soon as the laws required to carry them into operation shall have been passed by the Imperial Parliament of Great Britain, by the parliament of Canada and by the legislature of Prince Edwards Island on the one hand and by the Congress of the United States on the other. Such assent having been given, the said articles shall remain in force for the period of ten years from the date at which they may come into operation, and, further, until the expiration of

two years after either of the high contracting parties shall have given notice to the other of its wish to terminate the same; each of the high contracting parties being at liberty to give such notice to the other at the end of the said period of ten years or at any time afterwards."

As will hereafter appear Articles XVIII to XXV, inclusive, and Article XXX of the Treaty have been since abrogated, and the question whether Article XXIX is still in force depends upon the interpretation to be put upon the phrase "*the term of years mentioned in Article XXXIII*" used in Article XXIX in fixing the period of its continuance in force.

It is argued in some quarters that the phrase "*the term of years mentioned in Article XXXIII*," indicates not the period of ten years and two years' notice mentioned in Article XXXIII, but that the life of Article XXIX is consistent only with the life of the Articles mentioned in Article XXXIII.

The treaty itself nowhere expresses the idea that the co-existence of the fishery provisions and Article XXIX was deemed important, but only that some period of the duration of Article XXIX must be fixed and fixed in the same manner as specified in Article XXXIII for terminating the fishery provisions

On March 1, 1873, Congress passed an act entitled "An Act to carry into Effect the Provisions of the Treaty between the United States and Great Britain, Signed in the City of Washington the 8th day of May, 1871, Relating to the Fisheries." The Act consisted of five sections, the first and second of which provided for carrying into effect the provisions of the Treaty "relating to the Fisheries." The fourth section provided for carrying into effect Article XXX of the Treaty. Section three of the Act of March 1, 1873, p. 213 (Sec. 2866 of the Revised Statutes of 1878) provided as follows:

"From the date of the President's proclamation declaring that he has evidence that the Imperial Parliament of Great Britain, the Parliament of Canada, and the legislature of Prince Edward's Island have passed laws on their part to give effect to the provisions of the treaty of Washington of May eighteen hundred and seventy-one, as contained in articles eighteen to twenty-five inclusive, and article thirty of said treaty, *and so long as said articles remain in force, according to the terms and conditions of article thirty-third of said treaty*, all goods, wares or merchandise arriving at the ports of New York, Boston and Portland, and any other ports in the United States which have been, or may from time to time be, specially designated by the President of the United States and destined for Her Britannic Majesty's possessions in North America, may be entered at the proper custom-house and conveyed in transit, without the payment of duties, through the territory of the United States, under such rules, regulations, and condition for the protection of the revenue as the Secretary of the Treasury may, from time to time, prescribe; and, under like rules, regulations and conditions, goods, wares, or merchandise may be conveyed in transit, without the payment of duties, from such possessions, through the territory of the United States, for export from the said port of the United States."

On July 1, 1873, President Grant issued a proclamation referring to the Treaty with Great Britain, and setting forth a Protocol of a conference held at Washington on the 7th day of June, 1873, by which it was mutually agreed between representatives of this country and Great Britain that the laws required "to carry the Articles XVIII to XXV, inclusive, and Article XXX of the Treaty aforesaid into operation, have been passed" by the United States and Great Britain and Canada, and it was mutually declared "that Articles XVIII to XXV, inclusive, and Article XXVI will take effect on the first day of July next."

The Resolution of Repeal.

On March 3, 1883, a joint resolution (No. 22, 22 Stat. 641, found in Vol. 1 of the Supplement to the Revised Statutes, 1874-1891, page 422), was passed which provided:

"RESOLVED, etc., That in the judgment of Congress the provisions of articles numbered eighteen to twenty-five inclusive, and of article thirty of the treaty between the United States and Her Britannic Majesty, for an amicable settlement of all causes of difference between the two countries, concluded at Washington on the eighth day of May, anno Domini eighteen hundred and seventy-one, ought to be terminated at the earliest possible time, and be no longer in force; and to this end the President be, and he hereby is, directed to give notice to the Government of Her Britannic Majesty that the provisions of each and every of the articles aforesaid will terminate and be of no force on the expiration of the two years next after the time of giving such notice.

Sec. 2. That the President be, and he hereby is, directed to give and communicate to the Government of Her Britannic Majesty such *notice of such termination* on the first day of July, anno Domini eighteen hundred and eighty-three, or as soon thereafter as may be.

Sec. 3. That on and after the expiration of two years' time required by said treaty, each and every of said articles shall be deemed and held to have expired and be of no force and effect, and that every department of the Government of the United States shall execute the laws of the United States (in the premises), in the same manner and to the same effect as if said articles had never been in force;

And the act of Congress approved March first, anno Domini eighteen hundred and seventy-three, entitled (1) "An act to carry into effect the provisions

of the treaty between the United States and Great Britain, signed in the city of Washington the eighth day of May, eighteen hundred and seventy-one, relating to the fisheries," *so far as it relates to the articles of said treaty so to be terminated* shall be and stand repealed and be of no force on and after the time of the expiration of said two years. (March 3, 1833)."

It is thus seen that the Resolution directing repeal or abrogation was very carefully limited to the specific section relating to the fisheries.

It is noteworthy that the joint resolution giving notice of the termination of certain articles of the treaty, does not refer to Article XXIX or give any notice of an intent to abrogate that Article. If Congress had desired to abrogate the latter article, it would have been an easy matter to have specifically referred to it at the time, and in view of the fact that the point was raised at the time and was not passed over inadvertently, it is strong evidence of contemporaneous construction in favor of the continued existence of Article XXIX. In fact, in both Senate and House it was distinctly and unanimously agreed, that Clause 29 would remain unaffected by the action abrogating the other sections. Such was the unquestioned purpose of both Senate and House and the words "so far as it relates to the articles of said treaty so to be terminated" were inserted on the floor of the Senate for the express purpose of saving and preserving Article 29.

This is shown conclusively by the following excerpts from the debates.

On the 21st of February, 1883, in the Senate, in discussion of the joint resolution, of March 3rd, 1883, which in the Senate was S. R. 123, the Foreign Relations Committee through Mr. Edmunds an amendment. The following debate took place:

Mr. Windom: "I wish to ask the Senator from Vermont (Edmunds) whether Section 3 which repeals 'an act to carry into effect the provisions of the treaty, etc.' will repeal the act under which goods are imported in transit through American territory

* * * while the Senator is looking for the Statute I desire to say that I am very unwilling to repeal those clauses of the treaty and those laws which relate to transportation in bond through this country, because it is a very large business and a very great interest would be injured if it should be done."

Mr. Frye: "No notice is given as to Article 29."

Mr. Edmunds: "Oh, no. The only question is whether this repealing clause of the act of 1873 is to operate as repealing the provisions that have been made to carry out article 29; but article 29 did not require any legislation about it: it executed itself. I will look now at the act of 1873 and see if it did provide for carrying out article 29."

Mr. McMillan: "I think the Senator will find it did."

Mr. Edmunds: "It may be but it was not necessary * * *"

To guard against all possible misconstruction about it, I move to amend the amendment of the Committee, page 3, after the end of the description of the title of the act, after 'fisheries' partly in line 13 and partly in line 14, to insert:

'So far as it relates to the articles of said treaty so to be terminated.'

So that we repeal the act only that far."

Mr. McMillan: "I think that covers it."

Mr. Windom: "I am sure it does."

Congressional Record, Vol. 14, part 4, page 3055, Feb. 1st, 1883, 47th Congress, 2nd Session.

And in connection with the same resolution, on page 298, of the same Volume, in the House, February 26th, 1883, the following occurred:

Mr. Rice, speaking for the Committee on Foreign Affairs, said:

"We must now give notice by the first of July of the abrogation of these clauses of that treaty, and provision is contained in the treaty of that clause and nothing else. * * *

Mr. Washburn: I ask the gentleman from Massachusetts whether the passage of this joint resolution will in any way interfere with section 2866 of the Revised Statutes, which provides for the carrying of goods in transit through this country?"

Mr. Rice: "Those provisions are excepted from the operations of this Resolution in terms in this Resolution. This applies only to the fisheries."

Mr. Washburn: "If that is the case, I have no objection to the passage of the bill; otherwise I would have objection."

The foregoing abstracts from the Congressional record show the clear intent of Congress to preserve Art. 29 in full force.

The argument on the other side is that because Art. 29 states it shall be in force for the term described in Art. 33, and because Art. 33 relates only to the Fisheries articles, therefore when the fisheries articles are abrogated by notice, Article 29 would fall also. But this is a strained and unnatural construction to place on the language in Art. 29, which is devoted to an entirely different subject. The only purpose in thus describing the term in 29 was to save the repetition of a lengthy sentence defining the term of duration. It contains 75 words, whereas the single reference to it in Sec. 29 calls for only 8 words.

President Cleveland expressed the opinion in his message that Section 29 had fallen with the fisheries sections, notwithstanding the express intent of Congress to the contrary.

President Cleveland's message went to Congress under these circumstances. Extreme irritation had existed

me time between the American and Canadian fishermen, and the President had negotiated a treaty settling these differences, but the Senate had rejected it. Then President Cleveland, feeling that our people were unjustly treated by Canada and under pressure from our fishermen, on August 23, 1888, just prior to the Presidential election of that year, in his message to Congress, turned to a policy of retaliation against Canada; and he deliberately chose the "transit in bond" privilege as the most vulnerable point of attack. He pointedly and openly recommended that Congress give him the power by legislation to withdraw this privilege—at the same time recognizing that it would hit both ways. In his message he said that no treaty stood in the way because 29 had been repealed in his opinion, but said if Congress differs from me about this, and

"if in the deliberate judgment of Congress any restraint to the proposed legislation exists, it is to be hoped that the expediency of its early removal will be recognized."

Messages and Papers of the Presidents, Vol. 8,
page 621.

But Congress refused to grant the request of the President. His opinion, given in times of political excitement, was directly contrary to the opinion of his great Secretary of State, Thomas F. Bayard, which was delivered under more calm and serene conditions.

Neither President Cleveland nor President Harrison used their powers to alter or change the practical construction then in force by both governments, but merely offered their opinions on the legal question to Congress, in asking for legislation.

The practical construction to the contrary continued as before.

The actual contemporaneous construction from 1883 down to the present time has been that the treaty is in force.

This was admitted down to 1893 by the Message of President Harrison, in language quoted herein—*post*, p. 54.

He further admitted that Congress certainly did not intend to abrogate that section, but expressly attempted to preserve it at the time the other sections were being abrogated. He says:

“An examination of the debates at the time of the passage of this joint resolution (1883) *very clearly* shows that Congress made an attempt to save Article XXIX of the Treaty and Section 3 of the Act of 1873. In the Senate on the 21st of February, 1883, several Senators, including Mr. Edmunds, Chairman of the Judiciary Committee, expressed the opinion that Article XXIX would not be affected by the abrogation of the other articles, and an amendment was made to the resolution with a view of leaving Section 3 of the Act of 1873 in force. The same view was taken in the debates in the House.”

Mr. Harrison finally gives his opinion as follows:

“I am inclined to think that using the aids which the protocol and the nearly contemporaneous legislation by Congress in the Act of 1873 furnish in construing the treaty, the better opinion is that Article XXIX of the treaty is no longer operative. . . . But the question whether Article XXIX is in force has less practical importance than has been supposed for it does not, if in force, place any restraints upon the United States as to the method of dealing with imported merchandise destined for the United States arriving at a Canadian port for transportation to the United States, or of merchandise passing through Canadian territory from one place in the United States to another.”

Secretary Bayard was called upon officially by the Secretary of the Treasury to inform the Treasury if Article

XIX was still in force. In his reply of July 6, 1887, the Secretary of State reviews the treaty and legislative provisions and advises the treasury that it is still in full force, both the treaty and also the legislation of March 1, 1873, carrying into effect Section 29. He stated:

"But it does not appear that Article XXIX * * * was so united with the fisheries articles that neither could stand without the latter. Such was unquestionably the view both of the Senate and the House. * * * The record of the debates of both points shows that the only question raised in either house was whether that part of the resolution which repealed the legislation carrying into effect the articles directed to be terminated would affect the provisions which gave effect to Article XXIX and it was in order to avoid the repeal of these provisions by implication, that the provision of the Act of 1873 should be repealed 'so far as it relates to the Articles of said Treaty to be terminated' was inserted. These words were not in the resolution as originally reported to the Senate but were inserted to meet the objection above stated. You will see also by memorandum accompanying this letter that in the Debates in Congress during the last Session it was generally understood and stated that Article XXIX remained in force."

Senate Executive Documents, 2nd Session, 52nd Congress, 1892-1893, Volume II, Ex. Doc. No. 40, pages 11, 12.

In the report of the Senate Committee on Foreign Relations on the proposed new Treaty with Great Britain, May 7, 1888, the majority reported that the 29th Article of the Treaty of 1871 was in full force. This report was signed by Senators Sherman, Edmunds, Frye, Evarts and Dolph.

The Minority of the Committee at the same time reported that Article XXIX was still in full force. This

report was signed by Senators Morgan, Saulsbury, Br... and Payne.

Thus the opinion of that Committee composed of the great Senators was unanimous.

Senate Miscellaneous Documents, 1st Session, 51st Congress 1887-1888, Volume 2, Mis. Docket 109.

Senator Edmunds speaking in the Senate August 1888, referring to the message of President Cleveland Article XXIX stated that in his judgment the opinion pressed by Mr. Cleveland that Article XXIX was not of force was "gravely erroneous." That it had been "of agreed in this body in former discussions of topics touching this question" and "was agreed when it passed the Act directing the President to terminate the Articles named, that Article XXIX was not terminated."

Senator Sherman referred to the President's opinion being based "upon a narrow and technical construction of Article XXXIII."

House Documents, Volume 132, April 1, 56th Congress, Second Session, page 332.

But it is claimed in the brief for the appellants that Section 3 of the Act of 1873 limited the life of Section 29 to the life of the other sections as to fisheries, and that when those sections were abrogated, 29 also fell. But, Insofar as the Act of Congress of 1873 gave life to Section 29, it was preserved by the express action of Congress in the resolution of 1883 whereby the repeal was expressly limited to the extent of its operations on Articles 18-25 and 30.

It is conceded on all hands that Congress intended to limit the repeal of the Act of 1873 to the fisheries section and not to affect Section 29. This was conceded by President Cleveland, also by President Harrison, in their m...

ages, but it was said that the intention of Congress had miscarried, and that the language of the repeal was not apt to effect this intention. We submit this position is wholly unwarranted. The intent of Congress is perfectly plain, and that intent should be carried out. The situation exactly the same as if the act or resolution of 1883 had read:

"The Act of 1873 is repealed so far as it affects Sections 18-25 and 30, but said act shall remain in full force to give effect to Section 29."

Everybody agrees that this was the plain intent of Congress, and will the courts say the legislation should be construed directly opposite to the plain intention of Congress?

The most that could possibly be claimed from this state of facts would be that Section 3 of the Act of 1873 was repealed, not that Clause 29 of the Treaty was thereby abrogated. The treaty itself pointed out the method by which Clause 29 could be abrogated, namely, by a specific notice from one of the contracting parties to the other, at any time after the ten year period, but not only was this notice never given, but Congress expressly directed the resident to give notice of the abrogation of the fisheries sections. The treaty, therefore, remained in full force on its subject, and the suitable legislation which has existed outside the Act of 1873, applies to give full force to Section 29, which is precisely the practical construction which has always been given to it by the Government of the United States and the Government of Canada.

The Practical Construction.**Importance of Practical Construction.**

We agree with the Government brief in this case (page 47, 48), that the practical construction by the executive and legislative branches of the Government should have great weight with this court as to the existence or non-existence of this treaty.

Counsel for the Government, in their brief at page 47, state the proposition as follows:

“The question being essentially political and not judicial, the legislative and executive interpretation should be followed.”

The practical construction by our government as well as the Canadian government, has been, for the entire fifteen years, that Clause 29 of the Treaty is in force.

This is expressly stated by President Harrison to be the case up to the date of his message which was January 1888 (President Cleveland's message was August 23, 1889). In his message President Harrison said:

“It should be added that the United States has conducted continuously, through the Treasury Department, our trade intercourse with Canada, as if Article XXIX of the Treaty and Section III of the Act of 1873 remained in force, and that Canada has continued to yield in practice the concessions made by her in that Article. No change in our Treasury methods was made, following Mr. Cleveland's message from which I have quoted.”

Notwithstanding Mr. Cleveland had expressed the opinion in 1888 that Clause 29 had been abrogated, neither he nor President Harrison attempted to abolish or alter the practical construction then in force, but that practice continued.

ast the same as before, both through the United States
nd through Canada. It has been continued ever since,
o this hour, with the exception of a few days at the time
f the seizure of the goods in question.

Immediately following the decision of Judge Tuttle the
ld regulations were put in force and they have continued
ntil now.

As a matter of fact when the Volstead Act was about
o go into effect, the Treasury adopted the necessary regu-
lations relative to the transportation of liquors, as permit-
ted in the Volstead Act, for certain purposes. It is known
as Article 16 of Regulations 60 under the National Prohi-
bition Act, and Article 16 includes Sections 81 to 93 inclu-
ive, covering in detail the general subject of transpor-
tation.

Section 93 provides:

"The provisions of this article do not apply in any
respect to the continuous transportation of intoxicat-
ing liquors under United States Customs supervision
and under bond through the United States from one
foreign country to the same or another foreign coun-
try."

Thus, the practical construction of the Treasury Depart-
ment has been that this practice is not an "importation"
or an "exportation," or "transportation within," but it is
different and a fourth act recognized as "transit in
bond" or a "conveyance in transit" and not within the
purview of the National Prohibition Act.

Alfred Lucking,
For Appellee.

Argument for the Government.

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GROGAN, COLLECTOR OF INTERNAL REVENUE
FOR THE FIRST DISTRICT OF MICHIGAN, ET
AL. v. HIRAM WALKER & SONS, LTD.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF MICHIGAN.

ANCHOR LINE (HENDERSON BROTHERS), LTD.
v. ALDRIDGE, COLLECTOR OF CUSTOMS FOR
THE PORT OF NEW YORK.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF NEW YORK.

Nos. 615, 639. Argued April 19, 1922.—Decided May 15, 1922.

The transportation in bond from Canada through the United States of whisky intended as a beverage, destined to a foreign country, and transshipment of whisky from one British ship to another in a port of the United States, are forbidden by the Eighteenth Amendment and the National Prohibition Act, which, in this regard, supersede the provisions of Rev. Stats., § 3005, as amended, and Art. XXIX of the Treaty with Great Britain of May 8, 1871, (if it was not previously abrogated), authorizing transit of foreign merchandise through this country without payment of duty.

P. 88.

275 Fed. 373, (No. 615), reversed.

No. 639, affirmed.

APPEALS from decrees of the District Court, the first granting, and the second refusing, an injunction, in suits to prevent interference with transportation and transshipment of whisky.

Mr. Assistant to the Attorney General Goff, with whom *Mr. Abram F. Myers*, Special Assistant to the Attorney General, was on the brief, for appellants in No. 615 and appellee in No. 639.

The Eighteenth Amendment and the Prohibition Act apply to and prohibit the transshipment of intoxicating liquors for beverage purposes in or through the United States.

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Argument for the Government.

While the ultimate object is the prevention of the use, the immediate purpose is the destruction of all traffic in or dealing with the interdicted commodities.

This follows from the language employed. Neither the amendment nor the act in terms forbids the use of intoxicating liquors; they are concerned merely with the incidents of ownership, such as the manufacture, sale, transportation, possession, etc. *Street v. Lincoln Safe Deposit Co.*, 254 U. S. 88, 95.

The reason for this is that a more effective method of eradicating the evil of use is by preventing the means by which it comes into being, than by direct inhibition on the use.

The amendment and the act clearly were intended to prohibit the possession or transportation of liquor for beverage purposes, whether for consumption within the United States or without. It is impossible to understand why the proviso exempting liquor in transit through the Panama Canal was made in § 20, Title III, while no similar clause was added to § 3, Title II, if Congress intended to exempt from the latter the transshipment of liquors.

Again, both the amendment and the act expressly prohibit the exportation of intoxicating liquors from the United States. Such prohibition is inconsistent with an intention to restrict their application to liquors intended for consumption in the United States. When the act was passed there were stored in bonded warehouses many millions of gallons of distilled spirits manufactured here strictly in accordance with law. Congress in forbidding the exportation of this legally acquired liquor could have been influenced only by apprehension of inevitable losses and diversions to unlawful uses attendant upon the transportation to seaboard.

The proceedings in Congress evidence the legislative intention to prohibit all possession and all transportation

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except as specifically authorized. 58 Cong. Rec. 2449; Sen. Rep. 151; Title II, § 3. The transshipment or "in transit" conveyance of intoxicating liquor necessarily involves its "possession" as well as its "transportation."

United States v. Gudger, 249 U. S. 373, and *Street v. Lincoln Safe Deposit Co.*, 254 U. S. 88, distinguished.

Unlike *American Banana Co. v. United Fruit Co.*, 213 U. S. 347, there is involved in the present cases no attempt to apply the laws of the United States to acts committed in a foreign country. Cf. *Strathearn S. S. Co. v. Dillon*, 252 U. S. 348.

The Prohibition Act, in its application to the transshipment of intoxicating liquor for beverage purposes, is constitutional. Congress in legislating for the enforcement of the amendment may provide all means reasonably necessary effectively to suppress the prohibited acts. *McCulloch v. Maryland*, 4 Wheat. 316, 421, 423; *Powell v. Pennsylvania*, 127 U. S. 678, 685; *Otis v. Parker*, 187 U. S. 606, 608, 609; *Public Clearing House v. Coyne*, 194 U. S. 497; *Purity Extract Co. v. Lynch*, 226 U. S. 192, 201; *Ruppert v. Caffey*, 251 U. S. 264. And because of their noxious qualities all traffic in or dealing with intoxicating liquor may be absolutely suppressed. *Crane v. Campbell*, 245 U. S. 304, 307, 308.

Plaintiffs have not by proper allegations brought themselves within Art. XXIX of the Treaty with Great Britain of 1871; but in any event that article has been abrogated.

Section 3005, Rev. Stats., conferred no affirmative rights with respect to the transshipment of merchandise. Assuming that it did, it was superseded by the Prohibition Act so far as shipments of liquor are concerned.

Mr. Alfred Lucking for appellee in No. 615.

The bill alleges a case under the Treaty with Great Britain of 1871. Article XXIX of that treaty is still in full force.

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Argument for Appellee in No. 615.

There is in the National Prohibition Act no express repeal of Rev. Stats., § 3005; nor has there been a repeal of that section by implication, so far as intoxicating liquors are concerned. There is no inconsistency between § 3005, permitting transshipments through the United States from one foreign country to another, and the National Prohibition Act, which aims to prevent the manufacture and sale and in part the use of intoxicating beverages within the United States. Both may stand and be enforced. Repeals by implication are not favored.

No doubt Congress may pass a law breaking down this treaty, *pro tanto*, and withdrawing the rights which have so long obtained under it; but treaty rights should be regarded as inviolable and not be held to be impaired by subsequent legislation unless the intention of Congress is perfectly clear. *Chew Heong v. United States*, 112 U. S. 540, 549; *Frost v. Wenie*, 157 U. S. 59; *United States v. Gue Lim*, 176 U. S. 464; *United States v. Lee Yen Tai*, 185 U. S. 221; *Johnson v. Browne*, 205 U. S. 321.

The purpose of the Eighteenth Amendment and the Prohibition Act being to prohibit the use as a beverage within the United States, the prevention of shipping through in bond, duly sealed up and beyond the possibility of being used in the United States, is not within the spirit or purpose of either the amendment or the act. *United States v. Palmer*, 3 Wheat. 610; *American Banana Co. v. United Fruit Co.*, 213 U. S. 347.

Not being within the spirit or purpose of the act, the act will not be construed to include the case. *Faw v. Marsteller*, 2 Cr. 10; *Taylor v. United States*, 207 U. S. 120; *Holy Trinity Church v. United States*, 143 U. S. 457, 459; *American Security Co. v. District of Columbia*, 224 U. S. 491, 495; *Lau Ow Bew v. United States*, 144 U. S. 47, 61; *United States v. Palmer*, 3 Wheat. 610.

Bringing into the United States for transshipment through the United States to another foreign country is

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not an "importation." 27 Ops. Atty. Gen. 440; *McLean v. Hager*, 31 Fed. 602, 604, 605; *The Conqueror*, 166 U. S. 110, 115; *United States v. 85 Head of Cattle*, 205 Fed. 679; *The Concord*, 9 Cr. 387. The cases just cited are also authority that the sending out of the same goods is not an "exportation." See also *Kidd v. Flagler*, 54 Fed. 369; *Swan & Finch Co. v. United States*, 190 U. S. 143; 17 Ops. Atty. Gen. 583. Nor is transportation through the United States from one foreign country to another a "transportation within" the United States. *United States v. Gudger*, 249 U. S. 373; *Street v. Lincoln Safe Deposit Co.*, 254 U. S. 88.

The practice in question is a separate and distinct act, recognized by the statutes and in congressional and departmental proceedings since 1866, as "conveyance in transit" or "transit in bond." Counsel for the Government contend that all "possession" is forbidden by § 3 of the act, and hence this practice is banned. But this is not so. Under the "conveyance in transit" practice, the possession is constructively and actually the possession of the United States, through its customs officers and its bonded carriers. U. S. Comp. Stats., 1916, §§ 5695, 5698-5700; *Seeberger v. Schweyer*, 153 U. S. 612, 613; *Hartranft v. Oliver*, 125 U. S. 528, 530; *Harris v. Dennie*, 3 Pet. 303, 304; Treasury Regulations, 1915, Art. 695.

The provision expressly excepting transportation through the Panama Canal has no application here. It is not connected with or a part of the sections now being interpreted. The rule "*expressio unius*" is only an aid to discovering the legislative intent when not otherwise manifest. It is never hard and fast. *United States v. Barnes*, 222 U. S. 518, 519; *Dwight v. American Co.*, 263 Fed. 318; 36 Cyc. 1122.

Mr. Lucius H. Beers, with whom *Mr. Franklin B. Lord* and *Mr. Allen Evarts Foster* were on the brief, for appellant in No. 639.

The Eighteenth Amendment and the National Prohibition Act do not purport to apply to the use of intoxicating liquor outside of the United States. It expressly appears from the amendment that it is to prevent the use of intoxicating liquors as a beverage only within the United States and territory subject to the jurisdiction thereof.

An intention ought not to be attributed to Congress to interfere with the use of liquor as a beverage outside of United States territory. *American Banana Co. v. United Fruit Co.*, 213 U. S. 347; *Milliken v. Pratt*, 125 Mass. 374.

Where Congress has intended to prevent the transshipment in American ports of merchandise moving from one foreign country to another, it has expressly provided to that effect.

A thing may be within the letter of the statute and yet not within the statute because not within its spirit nor within the intention of its makers. *Holy Trinity Church v. United States*, 143 U. S. 457, 458, 459; *Lau Ow Bew v. United States*, 144 U. S. 47, 61; *Taylor v. United States*, 207 U. S. 120.

The transshipment here involved is not "transportation" within the prohibition of the amendment or of the act. *United States v. Gudger*, 249 U. S. 373; *Street v. Lincoln Safe Deposit Co.*, 254 U. S. 88. Nor is it "importation" or "exportation," as these words have heretofore been defined by the federal courts. *Swan & Finch Co. v. United States*, 190 U. S. 143, 144; *Flagler v. Kidd*, 78 Fed. 341, 344; *United States v. 85 Head of Cattle*, 205 Fed. 679, 681; *The Concord*, 9 Cr. 387, 388; 27 Ops. Atty. Gen. 440.

Even if it could be held that the transshipment here involved amounts legally to "importation" or "exportation," such transshipment does not constitute "importation" or "exportation" within the prohibition of the amendment or of the act. The Federal Government was seeking to prevent the use of alcoholic beverages by per-

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sons subject to its jurisdiction. It is well known that this use of alcoholic beverages has been opposed partly on economic grounds, but also on moral grounds; and it would have put the United States in an unfortunate moral position if the amendment and act had still left it possible for Americans to ship to other countries beverages, the use of which was considered immoral and uneconomic in the United States. And it is therefore not surprising that the framers of the amendment and of the act made use of the words "exportation" and "export" so as to put the United States in a proper moral position in this regard.

The inherent character of this merchandise does not require its exclusion and Congress has provided that liquor may be imported for medicinal and other nonbeverage purposes.

A special federal statute has long existed permitting the transshipment in our ports of merchandise destined for a foreign country, and a general statute such as the Prohibition Act, does not repeal such a special statute "unless the repeal be expressed or the implication to that end be irresistible." Rev. Stats., § 3005. *Ex parte United States*, 226 U. S. 420; *Washington v. Miller*, 235 U. S. 422.

It is inherently improbable that Congress can have intended to prohibit these transshipments when it framed the Prohibition Act. These transshipments are not our commerce; our interference with them is an interference with the commerce of other nations; and we have every reason to assume that this interference will be resented and might well lead to action by foreign countries which would seriously affect American exports.

If the Prohibition Act be construed as prohibiting transshipments of the kind here involved, it is unconstitutional. It cannot be sustained under the commerce clause. *Trade-Mark Cases*, 100 U. S. 82, 96. A statute enacted pursuant to a constitutional amendment which

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authorizes Congress to enact laws for the enforcement of the rights secured by such amendment, is void if it is broader than the amendment which it is designed to enforce. *United States v. Reese*, 92 U. S. 214; *Karem v. United States*, 121 Fed. 250. A construction prohibiting these transshipments ought, therefore, to be avoided.

Laws of Congress are always to be construed to conform to the provisions of a treaty, if possible to do so without violence to their language. Article XXIX of the Treaty of 1871 with Great Britain, providing for the transshipment of merchandise without the payment of duties, was not repealed in 1883, and is still in force. *United States v. 43 Gallons of Whiskey*, 108 U. S. 491, 496; *Lem Moon Sing v. United States*, 158 U. S. 539, 549.

MR. JUSTICE HOLMES delivered the opinion of the court.

These cases raise the question whether the Constitution and the Volstead Act prohibit the transportation of intoxicating liquors from a foreign port through some part of the United States to another foreign port. The first is a bill by a corporation of Canada against the Collector of Customs and the Collector of Internal Revenue for the Eastern District of Michigan to prevent their carrying out the orders of the Treasury Department to stop the plaintiffs from shipping whiskey intended as a beverage from Canada by way of Detroit in bond through the United States to Mexico, Central or South America. The irreparable injury that will be done to the plaintiff's business is fully shown, and the decision depends on the single question stated above. An injunction was granted by the District Court. 275 Fed. 373. The second case is to prevent similar interference with the transshipment of whiskey from one British ship to another in the harbor of New York. Upon a consideration of the same general questions an injunction was refused by the District

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Court for the Southern District of New York, October 21, 1921.

The plaintiffs rely upon Rev. Stats., § 3005, as amended, and Article XXIX of the treaty, concluded with Great Britain on May 8, 1871, 17 Stat. 863. By the former, an exemption in a revenue act, merchandise arriving at any port of the United States destined for any foreign country may be entered at the custom house and conveyed in transit through the territory of the United States, without the payment of duties, under such regulations as to examination and transportation as the Secretary of the Treasury may prescribe. See *United States v. Yuginovich*, 256 U. S. 450. By the treaty, for the term of years mentioned in Article XXXIII merchandise arriving at the ports of New York, Boston and Portland, and other ports specially designated by the President, and destined for British possessions in North America, may be entered at the customs house and may be conveyed in transit without the payment of duties through the territory of the United States under such rules, &c., as the Government of the United States may prescribe; and under like rules, &c., from such possessions through the territory of the United States for export from the said ports of the United States. President Cleveland and President Harrison in messages to Congress expressed the opinion that Article XXIX had been abrogated. In view of the parallelism between the statute and the treaty the question seems of no importance except so far as the existence of the treaty might be supposed to intensify the reasons for construing later legislation as not overruling it. But makeweights of that sort are not enough to affect the result here.

On the other side is the Eighteenth Amendment forbidding "the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all

territory subject to the jurisdiction thereof for beverage purposes." There is also the National Prohibition Act of October 28, 1919, c. 85, Title II, § 3, 41 Stat. 305, 308, which provides that, except as therein authorized, after the Eighteenth Amendment goes into effect no person shall manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor. All the provisions of the act are to be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented.

The routine arguments are pressed that this country does not undertake to regulate the habits of people elsewhere and that the references to beverage purposes and use as a beverage show that it was not attempting to do so; that it has no interest in meddling with transportation across its territory if leakage in transit is prevented, as it has been; that the repeal of statutes and *a fortiori* of treaties by implication is not to be favored; and that even if the letter of a law seems to have that effect a thing may be within the letter yet not within the law when it has been construed. We appreciate all this, but are of opinion that the letter is too strong in this case.

The Eighteenth Amendment meant a great revolution in the policy of this country, and presumably and obviously meant to upset a good many things as well as off the statute book. It did not confine itself in any meticulous way to the use of intoxicants in this country. It forbade export for beverage purposes elsewhere. True this discouraged production here, but that was forbidden already, and the provision applied to liquors already lawfully made. See *Hamilton v. Kentucky Distilleries & Warehouse Co.*, 251 U. S. 146, 151, n. 1. It is obvious that those whose wishes and opinions were embodied in the Amendment meant to stop the whole business. They did not want intoxicating liquor in the United States and reasonably may have thought that if they let it in some

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of it was likely to stay. When, therefore, the Amendment forbids not only importation into and exportation from the United States but transportation within it, the natural meaning of the words expresses an altogether probable intent. The Prohibition Act only fortifies in this respect the interpretation of the Amendment itself. The manufacture, possession, sale and transportation of spirits and wine for other than beverage purposes are provided for in the act, but there is no provision for transhipment or carriage across the country from without. When Congress was ready to permit such a transit for special reasons, in the Canal Zone, it permitted it in express words. Title III, § 20, 41 Stat. 322.

Street v. Lincoln Safe Deposit Co., 254 U. S. 88, was decided on the ground that the liquors were in the strictest sense in the possession of the owner (254 U. S. 92, 93, see *Union Trust Co. v. Wilson*, 198 U. S. 530, 537), and that to move them from the warehouse to the dwelling was no more transportation in the sense of the statute than to take them from the cellar to the dining room; whereas in *Corneli v. Moore*, 257 U. S. 491, they were not in the owner's possession and required delivery and transportation to become so. In *United States v. Gudger*, 249 U. S. 373, the only point was that transportation through a State was not transportation into it within the meaning of the statute before the court. None of these cases has any bearing upon the question here. We are of opinion that the decree in *Grogan v. Hiram Walker & Sons, Ltd.*, should be reversed, and the decree in *The Anchor Line, Ltd., v. Aldridge*, affirmed.

615. Decree reversed.

639. Decree affirmed.

MR. JUSTICE MCKENNA, with whom concurred MR. JUSTICE DAY and MR. JUSTICE CLARKE, dissenting.

I am unable to concur in the opinion and judgment of the court.

80. MCKENNA, DAY and CLARKE, JJ., dissenting.

The first case presents the right to transport intoxicating liquor in bond through the United States in accordance with certain rights given by the Revised Statutes and a treaty with Great Britain, notwithstanding the Eighteenth Amendment of the Constitution and its auxiliary legislation, the Volstead Act.

The second case concerns the transshipment of like liquor from one British ship to another British ship in New York harbor. In the first case it was decided that the right of transportation still exists. 275 Fed. 373. In the second case a prohibitive effect was ascribed to the Amendment and the legislation.

The factors of decision are the policies constituted by the amendment to the Constitution, the statute enacted in aid of it, other statutes preceding it, and a treaty of the United States with Great Britain. And their relation is to be determined, and range. What shall be the test of determination? The words of the instruments? These, indeed, may make individuality, and express purposes, but if the purposes collide, which must give way? And upon what considerations? It is the view of the court that the purposes do collide and the court assigns prevailing force to the Eighteenth Amendment and the Volstead Act—the reform they instituted having annulled § 3005 of the Revised Statutes as amended, and Article XXIX of the treaty with Great Britain, May 8, 1871.

I am unable to assent. The factors are not in antagonism but each has a definite purpose consistent with the purpose of every other.

I consider first the Eighteenth Amendment. Its provision is that one year from the date of its ratification, the manufacture, sale or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from, the United States and all territory subject to the jurisdiction thereof for beverage purposes, is prohibited.

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It will be observed that the Amendment provides against the manufacture, sale and certain movements of intoxicating liquors. Those movements are its transportation within, its importation into, and its exportation from the United States. The last two may be put immediately out of consideration. The liquor in the cases at bar, neither in common nor legal sense, was an importation into the United States or exportation from it.¹ Importation and exportation are constituted of something more than ingress of the intoxicants, under bond, at one border of the country and egress, under bond, at another border, the purpose being for passage only through the country and having as impalpable effect upon it as if the passage were by airship. Still less, if I may suppose the impossible, is the transshipment of liquors in New York harbor from one British ship to another under the supervision of revenue officers, the importation or exportation of the liquors into or from the United States.

The other movement is a case of *transportation within the United States* in the literal sense of the words, but this court in *Street v. Lincoln Safe Deposit Co.*, 254 U. S. 88, has limited its apparent universality by accommodating it to conditions and preëxistent rights, and this against the executive and reforming zeal of a public officer sustained by the judgment of a District Court, thereby applying the rule, denominated by Mr. Justice Brewer as "familiar," and variously illustrated by him, in *Holy Trinity Church v. United States*, 143 U. S. 457, that a statute should not be taken at its word against its spirit, and intention. The rule has had illustration since and this court following it, and its sanction in common sense, declared

¹ 27 Ops. Atty. Gen. 440; *McLean v. Hager*, 31 Fed. 602; *The Conqueror*, 166 U. S. 110, 115; *United States v. 85 Head of Cattle*, 205 Fed. 679; *The Concord*, 9 Cranch, 387; *Swan & Finch Co. v. United States*, 190 U. S. 143.

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against the destructive revolution urged, based upon the literal meaning of words. The court decided that it was not "unlawful to have or possess" (the words of the Volstead Act) liquors, and that *transportation* thereof from a room leased in a public warehouse, where they were stored, to the dwelling house of the owner of them for consumption for himself and family was not adverse to the act or to the Eighteenth Amendment. The decision was only possible by rejecting the literal meaning of the words unlawful "to have or possess" intoxicating liquors or the "transportation" of them "within the United States" and accommodating those words to the spirit and intention of their use.

In *Corneli v. Moore*, 257 U. S. 491, a distinction between a room leased in a public warehouse and a public warehouse was made, and the *transportation* from the latter was decided to be prohibited. In other words, it was decided that liquor in a public warehouse was not in possession of the owner of the liquor and that, therefore, its removal from the warehouse was a transportation of it within the United States from one place to another. The intention of the word was satisfied and the case is consistent with *Street v. Lincoln Safe Deposit Co.*

But in *United States v. Gudger*, 249 U. S. 373, it was decided that the *transportation* of liquor through a State was not *transportation* into it, within the meaning of a provision in the Post Office Appropriation Bill. To me the case is decisive of those at bar.

With the suggestion of it and the other cases in our minds, let us consider what meaning and purpose are to be assigned to the Eighteenth Amendment and the Volstead Act. It is certainly the first sense of every law that its field of operation is the country of its enactment. *American Banana Co. v. United Fruit Co.*, 213 U. S. 347. And this is true of the Eighteenth Amendment and the Volstead Act, and necessarily, they get their meaning

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from the field and purpose of their operation—from the conditions which exist in that field or are designed to be established there. The transportation that they prohibit is transportation within that field—that is, the United States, and “for beverage purposes.” The importance of the purposes suggests the emphasis of italics, and the Volstead Act is at pains to declare that it shall be construed “to the end that the use of intoxicating liquor as a beverage may be prevented.”

The transportation and the purposes are, therefore, complements of each other and both must exist to fulfill the declared prohibition. Neither exists in the cases at bar—the transportation in neither is, in the sense of the Amendment and act, “within” the United States “for beverage purposes.” In one it is through the United States, in the other transshipment in a port of the United States, and both under the direction and control of the revenue officers of the United States and for use in other countries than the United States. Not only, therefore, are the cases not within the prohibition of the Eighteenth Amendment or the Volstead Act, but they are directly within § 3005 of the Revised Statutes and the treaty with Great Britain. In the view of the court, however, the section and the treaty have been extinguished—superseded by a world-wide reform that cannot tolerate any aid by the United States to the offensive liquor.

“The Eighteenth Amendment,” is the declaration, “meant a great revolution in the policy of this country” and did not timidly confine itself “to the use of intoxicants in this country.” There is appeal in the declaration. It presents the attractive spectacle of a people too animated for reform to hesitate to make it as broad as the universe of humanity. One feels almost ashamed to utter a doubt of such a noble and moral cosmopolitanism, but the facts of the world must be adduced and what they dictate. They are the best answer to magnified sen-

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timent. And the sentiment is magnified. The Amendment and the Volstead Act were not intended to direct the practices of the world. Such comprehensive purpose resides only in assertion and conjecture and rejects the admonitory restraint of § 3005, the treaty with Great Britain and the non-interfering deference that nations pay to the practices of one another.

If such mission had been the purpose it would have been eagerly avowed, not have been left to disputable inference. Zeal takes care to be explicit in purpose and it cannot be supposed that § 3005 and the treaty were unknown and their relation—harmony or conflict—with the new policy; and it must have been concluded that there was harmony, not conflict. The section and the treaty support the conclusion. The section permits all merchandise arriving at certain ports of the United States and destined for places in the adjacent British provinces, and arriving at certain ports and destined for places in Mexico, to be entered at the custom-house and conveyed in transit through the United States. In a sense, it has its complement in § 3006 which gives to merchandise of the United States the same facility of transportation through the British provinces or the Republic of Mexico.

The treaty (Article XXIX) provides a reciprocation of privileges. Merchandise arriving at ports in the United States and destined for British possessions in North America may be entered at the proper custom-house and conveyed in transit through the United States without payment of duties. A like privilege is given United States merchandise arriving at ports in the British possessions for transit through those possessions.

In other words, the treaty is an exchange of trade advantages—advantages not necessary to the commerce of either, but affording to that commerce a facility. And yet, it is said, that it is the object of the Eighteenth Amendment to take away that facility, and to take away

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the transshipment of liquor in an American port from one British ship to another. This is the only accomplishment! What estimate can be put upon it? It takes away not a necessity of British commerce, as I have said, but a convenience to it, in disregard of a concession recognized by law and by a treaty. And upon what prompting? Universal reform? If so why was the Panama Canal given up as a convenience to the prohibited beverage and apparently with purposeful care? There is a perversion in one or the other of those actions that needs to be accounted for. There seems to be a misunderstanding of their respective effects, an overlooking of their antagonism, if the purpose of our legislation be a reversal of things not only in the United States but elsewhere. To deny the distribution of intoxicants by forbidding them transit through the United States and affording them distribution through the Panama Canal cannot both be conducive to the world-wide reform which the court considers was the mission instituted by the Eighteenth Amendment and put in execution by the Volstead Act.

It is said, however, that regarding the United States alone, the Amendment and the act have a practical concern. If liquor be admitted for transit, is the declaration, some may stay for consumption. The apprehension is serious—not of itself but because of its implication. It presents the United States in an invidious light. Is it possible that its sovereignty, and what it can command, cannot protect a train of cars in transit from the Canadian border to the Mexican border or the removal of liquors from one ship to another from the stealthy invasions of inordinate appetites or the daring cupidity of bootleggers? But granting that the care of the Government may relax, or its watchfulness may be evaded, is it possible that such occasional occurrences, such petty pilferings, can so determine the policy of the country as to justify the re-

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Syllabus.

peal of an act of Congress, and violation or abrogation of a treaty obligation, by implication?

I put my dissent upon the inherent improbability of such intention—not because it takes a facility from intoxicating liquor but because of its evil and invidious precedent, and this at a time when the nations of the earth are assembling in leagues and conferences to assure one another that diplomacy is not deceit and that there is a security in the declaration of treaties, not only against material aggression but against infidelity to engagements when interest tempts or some purpose antagonizes. Indeed I may say there is a growing aspiration that the time will come when nations will not do as they please and bid their wills avouch it.

I think the judgment in No. 615 should be affirmed and that in No. 639 reversed.
